87-2056

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

YESHIVA UNIVERSITY,

Petitioner,

— VS. —

EDNA H. SOBEL, M.D., on behalf of herself and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the admission of a Title VII plaintiff's statistical evidence of gender-based disparate pay, which fails to account for significant non-quantifiable pay determinants, shifts the burden of proof to defendant to prove that the omitted pay determinants are correlated with sex, and deprives the District Court of discretion to determine that the omitted pay determinants render the statistics insufficient to prove plaintiff's claim in light of all the evidence in the case.

2. Whether this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1986), requires a finding on whether there were gender-based pay differentials at any time prior to the applicability of Title VII, if the District Court finds no meaningful proof of the existence of pay disparities at the commencement of the actionable time period, and no proof of disparate treatment thereafter.

3. Whether the Court of Appeals exceeded its authority, and usurped the assignment power expressly conferred by Congress upon the District Courts, by ordering that the case be assigned to a different District Court judge on remand, where there was no motion to recuse or disqualify, and no finding of bias or persistent misapplication of law, and where the sole basis for the order was an appellate panel's perception that the judge's efforts, after twelve years on the case, suddenly became inadequate.

PARTIES TO THE PROCEEDING

Petitioner:	Yeshiva University
Respondents:	EDNA H. SOBEL, M.D., on behalf of herself and other professional faculty members employed by the defendant, Yeshiva University.

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TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Yeshiva University ("Yeshiva"), prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the Order of the District Court ("*Sobel IV*") is reported at 839 F.2d 18 (2d Cir. 1988). It is reproduced in Appendix A to this Petition at A-1-34.[1]

The opinion of the District Court after an initial remand by the Court of Appeals ("*Sobel III*") is reported at 656 F.Supp. 587 (S.D.N.Y. 1987) (Appendix B at A-35-46.) The opinion of the Court of Appeals reversing the initial determination of the District Court, and remanding for further proceedings ("*Sobel II*") is reported at 797 F.2d 1478 (2d Cir. 1986) (Appendix C at A-47-49.) The initial decision of the District Court after trial ("*Sobel I*") is reported at 566 F.Supp 1166 (S.D.N.Y. 1983) (Appendix D at A-50-100.)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (Appendix E at A-101-02) was entered on February 4, 1988. A timely petition for rehearing with a suggestion of rehearing *en banc* was filed; it was denied on March 17, 1988 (Appendix F at A-103-04). This Petition is filed within 90 days thereof. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The following sections of Title 28 of the United States Code are involved in this case:

> Section 137. Division of business among district judges
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> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide

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[1] References to the decisions below are hereinafter designated parenthetically as "A-__" followed by the Appendix page number(s) on which the referenced material appears.

the business and assign the cases so far as such rules and orders do not otherwise prescribe.

If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

Section 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT OF THE CASE

In this thirteen year old action, the individual plaintiff, Dr. Edna Sobel, and the certified class of 95 female physician-faculty members who were employed by Yeshiva's Albert Einstein College of Medicine ("AECOM") between 1974 and 1979 ("plaintiffs"), claim institution-wide, gender-based pay discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").[2] AECOM, like other prominent medical colleges, educates medical students, trains physicians, provides medical care to public and private patients, and is a major center for scientific research. (A-54.) Since its inception in 1955, AECOM has been recognized as a national leader in the hiring and promotion of female faculty. (A-38, 54 n.8.)

The decision below raises significant issues of broad concern, not previously addressed by this Court, relating to statistical proof of discrimination and the non-statutory authority of the Courts of Appeals to order that a case be reassigned to a different District Court judge on remand.

The court below substantially deviated from decisions of this Court and several Courts of Appeals which recognize that the District Courts must have discretion to evaluate the weight to be accorded statistical proof of discrimination. Rather, the Second Circuit held that concededly flawed and demonstrably unreliable

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[2] The "actionable time period" ran from December 20, 1974 to October 15, 1979. (A-50.) *See* Point II, *infra*.

statistics offered by a Title VII plaintiff are not only to be admitted into evidence, but credited with full probative value, even if they fail to consider the effects of major, unquantifiable determinants of pay. The Court further held that the admission into evidence of such deficient statistics shifts the burden of proof to the defendant to show that the flaws and omissions actually biased the result. The Second Circuit's decision, which misinterpreted this Court's decision in *Bazemore v. Friday* ("*Bazemore*"), 478 U.S. 385 (1986), thus improperly shifted the burden of proof to the defendant and eliminated the trial court's discretion to evaluate the probative value of flawed or irrelevant statistical evidence, and to determine, if appropriate, that such evidence, together with other proof in the case, is meaningless, unpersuasive or simply insufficient to satisfy a plaintiff's burden of proof.

The Second Circuit also misinterpreted *Bazemore*, and contradicted other Supreme Court authority, by requiring the District Court to make a finding on the issue of whether there had been historic "pre-Act" discrimination at the medical college, despite the District Court's finding that there was neither proof of gender-based salary disparities at the inception of the actionable time period nor disparate treatment during the period.

The Second Circuit further erred by directing, *sua sponte*, that a new District Judge be assigned to the case. The District Judge had supervised seven years of discovery, presided over the three-week trial and authored a scholarly 27-page decision after trial. Despite its finding that the judge had conducted a "thorough and searching inquiry" through the time of trial and decision in *Sobel I*, the Court of Appeals found that his efforts on remand suddenly became "inadequate" and therefore ordered that the case be reassigned. (A-33.) The reassignment order was made without any finding of bias or a statutory basis.

A. *Trial Evidence*

1. *Plaintiffs' Proof*

The trial of this sex discrimination case was preceded by seven years of discovery.[3] At the 1982 trial, plaintiffs did not produce

[3] The case was funded and staffed primarily by the United States Equal Employment Opportunity Commission ("EEOC") which intervened as a plaintiff in 1977. (A-2-3, 52.) The EEOC's intervention coincided with an expansion of the case

(footnote continued)

a single witness who could testify as to actual instances of discrimination. (A-84-87.) Due to the absence of such "anecdotal" evidence, plaintiffs' case was based entirely on multiple linear regressions and the foundation necessary to prove their validity. (A-50,60.) This foundation was crucial to plaintiffs' case as their experts conceded that their studies were valid only if they could accurately "mimic, by statistical formula, the variety of factors which determined salary at [AECOM]." (A-63.) Plaintiffs' experts theorized that if they could "mimic" AECOM's decision-making process, any differences between male and female salaries unexplained by the determinative factors they utilized would necessarily be attributable to sex discrimination. (*Id.*)

(a) *Medical College Compensation: A Product Of Responsibility And Productivity*

The trial evidence portrayed a highly diversified faculty of physicians whose many and varied responsibilities, and whose productivity in the performance of those responsibilities, largely determined the level of their pay. (A-55.) The District Court found that:

> The activities and responsibilities of [AECOM's] professors varied enormously. Some were involved primarily in classroom teaching, others in research, and still others in the clinical instruction of students. Of course, many of the professors were involved in two or three of these activities. *** A particular professor's responsibilities also depended in great part upon his or her particular department, specialty, and sub-specialty.

(*Id.*)[4]

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from one of pay discrimination in a single department to an "across-the-board" class action against the medical college as a whole. (A-52.) Prior to trial, all claims were dropped except for pay and pension discrimination against full-time female faculty. (*Id.* n.4.) Neither the EEOC nor one of the two original individual plaintiffs appealed the District Court's decision in *Sobel I*.

[4] The principal units administering AECOM's activities were its twenty-eight departments which fell into two broad categories: pre-clinical and clinical. (A-55.) The pre-clinical (or basic science) departments were those in which faculty engaged in teaching and/or research, but generally not in patient care. Faculty in the clinical departments treated patients and trained students, interns and residents. (*Id.*) Clinical faculty were generally paid more than pre-clinical faculty. (A-55-56.) Nevertheless, only certain of the statistical studies offered by plaintiffs included a clinical/research variable and plaintiffs asserted that it was not their "preferred"

(footnote continued)

The evidence was undisputed that as between faculty of even rank,[5] practicing in the same areas of specialization, salaries were a product of individual performance and productivity – factors which plaintiffs' multiple linear regressions failed to control for. (A-75-76.) The salaries of faculty in pre-clinical departments, for example, were strongly influenced by the quality of their published writings, by the importance and quality of their research, and by their reputations among other physicians in the same specialty and sub-specialty. (A-56, 75-76.) Yet, these crucial salary determinants were not quantifiable and they were therefore omitted from the regressions offered at trial.

Other productivity factors significantly influencing pay determinations at AECOM included teaching ability, performance of a major administrative responsibility, and skill as a physician. (A-75-76.) Of these productivity factors, only administrative responsibility was even partially quantifiable and this variable was omitted from plaintiffs' "preferred" analysis. (A-78.)

Thus, plaintiffs attempted to statistically prove pay discrimination between physician-faculty whose principal responsibilities were teaching, research and/or patient care without accounting for differences in the performance of those responsibilities by the faculty under study.[6]

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approach to account for this pay determinant. (A-64 and n.29.) Physicians who were trained in certain sub-specialties were also compensated at higher levels than those who were not. Nevertheless, the effect of sub-specialty on salary was not considered in any statistical study offered by plaintiffs. (A-74-75.)

[5] Faculty rank at AECOM reflected peer evaluations of creative scholarship and academic performance. Although plaintiffs abandoned their promotion claim prior to trial, the Court heard evidence on promotions. In this regard the District Court stated in *Sobel I*: "[h]aving heard substantial evidence on this very point, the Court . . . is convinced that promotions in rank, which were handled by independent faculty committees, were in fact based on merit and were not contaminated by elements of sexual discrimination." (A-77.) This portion of the *Sobel I* decision was affirmed in *Sobel IV*. (A-30.)

[6] Yeshiva submitted that rank was at least a partial proxy for the qualitative variables which were omitted from plaintiffs' regressions. (A-75-76.) The District Court held that "[a]lthough rank does not completely reflect such amorphous considerations as the quality of research and teaching, clinical expertise, and reputation, it is the only available variable that seems to give any weight to these important factors." (A-77.) The Court recognized an additional weakness in the use of rank as a proxy because it did not reflect qualitative considerations as to the large number of faculty who (1) were full professors, and (2) had served less than five years in rank, all of whom were therefore not promotable. (*Id.*)

(b) *Plaintiffs' Statistical Case*

(i) *Misspecified Model*

Plaintiffs' multiple linear regression model was a mathematical formula intended to estimate the effects of various independent factors ("variables") upon a dependent variable – in this case, salary.[7] (A-4, 63.) After accounting for the effects of the independent variables, the regression could theoretically calculate the unexplained differential in male/female salaries which is sometimes referred to the "sex coefficient".[8] (*Id.*)

Though plaintiffs' experts conceded that proper "specification," the selection of proper independent variables (i.e., determinants of salary) and the exclusion of improper ones, was essential to their model's validity, plaintiffs' experts had no knowledge of medical college pay and admitted that they simply relied upon the EEOC's trial counsel to select the variables.[9] (A-62-63.)

The District Court found that plaintiffs' statistical models were grossly "misspecified" (A-43, 74-76, 78-80) and this fundamental flaw in their proof was evident from the results of objective, mathematical tests widely used to determine the validity of regression

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[7] Multiple linear regressions, applying this and similar formulas, have been widely accepted as evidence in disparate treatment cases. *See, e.g., Bazemore*, 106 S. Ct. at 3009; *Griffin v. Board of Regents ("Griffin")*, 795 F.2d 1281, 1289-92 (7th Cir. 1986); *Penk v. Oregon State Board of Higher Education*, 816 F.2d 458, 465 (9th Cir. 1986), *cert. denied*, __U.S.__, 108 S. Ct. 158 (1987); *Eastland v. T.V.A. ("Eastland")*, 704 F.2d 613, 620-25 (11th Cir. 1983), *cert. denied sub nom. James v. T.V.A.*, 465 U.S. 1066 (1984); *Wilkins v. University of Houston ("Wilkins")*, 654 F.2d 388, 403-04 (5th Cir. 1981), *vacated on other grounds*, 459 U.S. 809 (1982). *See also* M. Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum.L.Rev. 737 (1980); F. Fisher, *Multiple Regression in Legal Proceedings*, 80 Colum. L.Rev. 702, 721-25 (1980). This Court recently noted its own acceptance of "statistics in the form of multiple regression analysis to prove statutory violations under Title VII." *McCleskey v. Kemp*, __U.S.__, 107 S.Ct. 1756, 1767 (1987).

[8] *See, e.g., Griffin*, 795 F.2d at 1290-91; *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1349 (N.D.Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988); *Penk v. Oregon State Board of Higher Education*, 36 EPD ¶ 36,711, 36,724 (D.Ore. 1985), *aff'd*, 816 F.2d 458 (9th Cir.), *cert. denied*, __U.S.__, 108 S. Ct. 158 (1987).

[9] In other cases, the absence of evidence to support the choice of variables used in a regression has been held to negatively affect the regression's probative value. *Eastland*, 704 F.2d at 623; *Stastny v. Southern Bell Tel. & Tel. Co.*, 458 F. Supp. 314, 323 (W.D.N.C. 1978), *aff'd in part and rev'd in part*, 628 F.2d 267 (4th Cir. 1980); *Presseisen v. Swarthmore College ("Presseisen")*, 442 F.Supp. 593, 616 (E.D.Pa. 1977), *aff'd n. op.*, 582 F.2d 1275 (3d Cir. 1978).

models. (A-79-80.) Though a statistical model should normally show a sex coefficient at the level of 2 or 3 standard deviations to be considered probative of discrimination,[10] a model which attains that level of significance nevertheless may not be probative, if such tests show that it is unreliable. T. Campbell, *Regression Analysis in Title VII Cases: Minimum Standards of Comparable Worth and Other Issues Where Law and Statistics Meet* ("Campbell"), 36 Stan.L.Rev. 1299, 1306-07 (1984). Here, since plaintiffs' model was not properly specified (partially because of the omission of non-quantifiable factors and partially because plaintiffs chose to omit other, quantifiable factors), these tests showed the model to be extremely unreliable. (A-79.)

One test examines the "standard error" of a regression. This test yields a "confidence interval" (in this case a dollar range) within which the projected salary disparity is likely to fall. Since the narrowest range within which plaintiffs' model could predict salaries at the two standard deviation level was nearly $26,000, the District Court found the standard errors in plaintiffs' regressions to be "unacceptably large."[11] (A-79.)

A regression model's explanatory accuracy can also be measured by its ability to predict individual salaries. The variance in salary that is accounted for by the model's independent variables is denoted as R^2.[12] (A-79 n.39.) Plaintiffs' models had R^2 levels between just

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[10] Statisticians can define the probability that a sex coefficient would occur purely by chance in terms of standard deviations. A standard deviation of 2 reflects a one-in-twenty chance that the level of disparity would have occurred randomly, while a standard deviation of 3 reflects a one-in-one hundred chance. *See generally Hazelwood School District v. United States*, 433 U.S. 299, 311 n.17 (1977); *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977).

[11] Plaintiffs were able to state only that for two of the six years they were 95% certain that there was a pay differential of $3,500, plus or minus $13,000. Stated another way, plaintiffs were reasonably certain that in 1976 and 1977 there was a salary disparity which could have ranged from women being paid $16,500 less than men, to men being paid $9,500 less than women.

[12] A perfectly predictive model would have an R^2 of one. A model in which the variables selected have no bearing on the dependent variable would have an R^2 of zero. *McCleskey v. Kemp*, 107 S.Ct. at 1764-65 n.6. The courts have recognized that R^2 is an appropriate test to determine the predictive ability, and hence the relevance, of a particular model. *See Griffin*, 795 F.2d at 1290-92; *Wilkins*, 654 F.2d at 403-05; *EEOC v. International Business Machines Corp.*, 583 F. Supp. 875, 899 (D.Md. 1984).

0.50 and 0.61. Yeshiva's experts noted that with values of R^2 that low plaintiffs' model was utterly unreliable as a method of testing for the presence of sex discrimination.

Having heard this and other evidence, the District Court determined that plaintiffs' regressions were "misspecified and unreliable" (A-79) and concluded that plaintiffs "failed to sustain their burden of proof by producing a valid and reliable model" (A-80).[13]

(ii) *No Proof Of Discrimination*

Plaintiffs' experts testified that their "preferred" study, utilizing only basic qualification and experience variables, spanned the years 1969-79, and showed statistically significant[14] pay differentials in 1970 and 1973-78.[15] (A-64-65, 68, 70, 72.) Confronted with

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[13] Plaintiffs did not dispute that their regressions omitted significant variables and that these omissions negatively affected their models' reliability. The EEOC conceded that the regressions omitted some unquantifiable productivity variables that could not be controlled for and termed these omissions "a basis for legitimate concern." (A-43.) Yeshiva's experts testified that inclusion of the omitted variables would have reduced or eliminated the sex coefficients altogether. One of Yeshiva's experts summarized these points as follows:

> . . . every time an additional variable which defendant [sic] have suggested was incorporated, what you find is that the standard error goes down, R square [sic] goes up, and the sex coefficient goes down. In other words, the general tendency here, the more accurate the model is the smaller the sex coefficient.

(*See* pg. 1933 of the trial transcript.)

[14] Significance was measured at the 5%, or two standard deviation level. (A-65.) No regression offered by plaintiffs at trial was significant at the three standard deviation level. (A-68-73.)

[15] This "preferred" study did not include any variable to directly measure any of the following factors, each of which were principal determinants of faculty salary at AECOM: clinical or research emphasis, rank, time in rank, major administrative responsibilities, quality of research, quality of teaching, quality and quantity of clinical service, quality of publications, reputation, private practice generation, development of an important clinical process, major grant procurement or administration, competitive offers, mobility, and other scientific contributions and achievements. (A-64, 75.) Plaintiffs' "preferred model" used only rudimentary qualification and experience variables which were largely redundant of each other: U.S. or non-U.S. medical school, advanced degree, board certification in any specialty, age, age squared, total medical experience, job tenure at AECOM, job tenure at AECOM squared, eight prior experience variables, the total of prior experience squared, New York State licensure, publication rate, and department. (A-64 n.30, 78-79.)

Yeshiva's criticisms, plaintiffs produced a model in their "rebuttal" report which included four variables suggested by Yeshiva's experts—clinical or research emphasis, rank, time in rank, and major administrative responsibilities.[16] (A-64, 69, 71, 73.) This "rebuttal" model showed statistically significant pay disparities in two years, 1973 and 1977, but not in 1974.

The limitations date, December 20, 1974, fell within the 1974-75 academic year and salaries for that year were therefore set in the pre-limitations period. Thus, plaintiffs' own evidence refuted their assertion before the Court of Appeals that the District Court failed to properly consider the "carryover effect" of pre-Act discrimination; at the pre-*Bazemore* trial, plaintiffs themselves unwittingly proved that there was no pay disparity to be carried over.

Plaintiffs also separately analyzed differences between the salaries of faculty members hired prior to March 24, 1972 (when Title VII became applicable to universities) and those hired thereafter.[17] (A-65.) As to the post-1972 faculty, plaintiffs' experts admitted that there was no statistical evidence of discrimination. (A-81.) With respect to faculty hired before March 24, 1972, there was no statistically significant showing of discrimination in 1974 (when salaries were set in the pre-limitations period) or, for that matter, 1975 (the first complete academic year in the actionable time period). Thus, there was no statistically significant evidence of discrimination which could have been carried over into the actionable time period, even as to the sub-set of pre-1972 hires.

(c) *Evidence Concerning The Individual Plaintiff*

Dr. Sobel testified in support of her individual claim; a second individual plaintiff, Dr. Bella Clutario, did not. (A-85, 87.) Dr. Sobel claimed that her salary was discriminatorily low, although she introduced no proof with respect to comparable male faculty. (A-87.) The Chairperson of the Department of Pediatrics from 1974 on testified that Dr. Sobel was overpaid in light of her responsibilities

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[16] Plaintiffs did not dispute that these four variables were major salary determinants and made no effort to prove that they were "tainted" by discriminatory selection or that they should have been omitted for any other reason.

[17] The District Court held in *Sobel III* that plaintiffs' pre-1974 regressions did not contain variables that their experts conceded at trial were "indispensible to a properly specified model and which they used for the 1974-1979 period." (A-45 n.12.)

and productivity. Her research program was discontinued because she could not maintain grant support and she published no articles after 1974. Dr. Sobel had no significant administrative duties, her clinical responsibilities were minimal and the Department received complaints about her inadequate teaching. (A-86.) The District Court noted in *Sobel III* that "[h]er testimony, standing alone, did little or nothing to assist the classwide claims." (A-43.)

2. *Yeshiva's Proof*

(a) *Elimination Of Any Salary Inequities Prior To The Actionable Time Period*

The District Court admitted substantial evidence concerning salaries and salary determinations prior to the actionable time period. This evidence showed that in 1972—the year Title VII became applicable to universities, and two years prior to the actionable time period—concerns relating to faculty salaries were brought to the attention of the then-new Acting Dean. Among the concerns were possible inequities between faculty in various departments, and between male and female faculty. The AECOM administration studied individual salary levels and endeavored to isolate any salary inequities. Salary inequities of all sorts were substantially eliminated by the 1973-74 academic year.[18]

(b) *Yeshiva's Criticism of Defects In Plaintiffs' Statistical Presentation*

Yeshiva introduced evidence, through its experts, showing that plaintiffs' statistical evidence was fatally flawed for a variety of reasons.[19] Yeshiva's experts testified that even with the inclusion

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[18] The 1973-74 academic year ended prior to the commencement of the actionable time period. Salary decisions for that year were made more than a year before the December 1974 limitations date.

[19] Yeshiva's statistical and econometric testimony was presented through four distinguished experts including the former chairperson of the Department of Mathematical Statistics at Columbia University, a noted econometrician from Vanderbilt University whose area of specialization was physician compensation, and the principal administrator of Columbia University's College of Physicians and Surgeons. (A-81-82 n.41.) These experts jointly concluded that the sex coefficients shown by plaintiffs' models were the product of their "unsound methods and assumptions, including the failure to account for academic, scientific, and medical productivity, the omission of critical factors influencing...salary, the inclusion of factors irrelevant to salary, and the misinterpretation of the meaning of the sex-coefficient as an indicator of discrimination." (Rebuttal Report Submitted For Yeshiva University at 1.)

of a small number of explanatory salary factors omitted by plaintiffs, the reported sex coefficients were dramatically reduced. (A-68-73.) For example, when only initial rank[20] was added to plaintiffs' "preferred model", even minimal statistical significance appeared in only one year of the six during the actionable time period.[21] (A-78.) With the inclusion of further measures of productivity and other actual determinants of pay, statistical significance disappeared entirely. (A-68, 69, 72-73.) Thus, the District Court found that plaintiffs' "proxies failed to adequately account for the true productivity differences and . . . the consequential underadjustment for these differences resulted in an overstatement of the sex coefficients."[22](A-76.)

(c) *Yeshiva's Salary Study*

This overstatement of the sex coefficients reported in plaintiffs' study was confirmed in Yeshiva's own study of AECOM salaries which examined pay in any given year as a function of initial salary (i.e. salary as of the limitations date, or, if subsequent, at hire) as augmented by annual salary increments. (A-81-82.) This study, which showed no statistically significant pay differentials, tended to confirm the absence of any "carryover" discrimination.[23]

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[20] "Initial rank" was defined as rank as of December 19, 1974 or upon entry into the faculty if thereafter.

[21] Since the Second Circuit held, in *Sobel IV*, that rank was an appropriate variable (A-30), the Court of Appeals' failure to have affirmed on the basis of this fact alone is inexplicable.

[22] Yeshiva's experts testified that if salary is regressed on proxies which imperfectly reflect determinants of pay, and if females generally have lower proxy values than men, there may well be an underadjustment for differences in true productivity and a resulting overstatement of the sex coefficient. Yeshiva proved that of the twenty proxies utilized by plaintiffs themselves, men scored higher on sixteen. (A-76.) Yeshiva's experts therefore concluded that men, due to their earlier entry into the medical field, would likely score higher on most proxies and that the failure to account for those proxies would in all likelihood bias the result by expanding the sex coefficient. (*Id.*)

[23] In examining initial salaries, Yeshiva utilized both an "urn" model, which compares the actual difference in adjusted male/female salaries with the difference resulting from a division of all salaries into two random groups, and a multiple linear regression. (A-82-84.)

Yeshiva's study of annual salary increments showed no statistically significant difference between men's and women's salary increases. (A-83.) However, the proportion of women who received above-guideline increases was higher than that of men. (A-83-84.) Thus, Yeshiva's statistical evidence corroborated that prior to the actionable time period AECOM eliminated any pay disparities which might have existed in the early 1970s.[24]

B. *Sobel I: Pay Claim Dismissed*

In *Sobel I*, the District Court found, upon at least the following independent substantive grounds,[25] that plaintiffs failed to prove their claim of pay discrimination:

> (1) the failure of plaintiffs' statistical studies to account for significant, non-quantifiable salary determinants which "had a direct effect upon compensation", such as the quality of research, teaching and clinical work (A-76);
>
> (2) the failure of plaintiffs' statistical studies to adequately account for differences in compensation between clinicians and researchers and among faculty engaged in differing subspecialties, and for the differing impacts on salary which the various quantifiable variables had in each department ("departmental stratification") (A-74-75);
>
> (3) the failure of plaintiffs to account for rank in their "preferred" studies, combined with the absence of statistically significant results in their "rebuttal" studies which included rank (A-77-78);
>
> (4) other significant elements of misspecification in plaintiffs' model, such as the inclusion of misleading variables and the use of multiple variables measuring the same thing ("multi-collinearity") (A-78-80);

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[24] Plaintiffs offered no reliable evidence that gender-based salary disparities existed even then. (A-38.)

[25] The District Court also found that plaintiffs had erroneously failed to exclude the effect of any pre-Act pay determination on total salaries during the actionable time period. (A-81.) The Court did not find, however, that there had been pre-Act discrimination. In addition, the Court refused to consider plaintiffs' attempt to assert a disparate impact claim on the procedural ground that plaintiffs, well into the trial, had changed their legal theory from disparate treatment to disparate impact. (A-89.)

(5) that "three widely used indicators of the accuracy of statistical models strongly suggested that the plaintiffs' model was unreliable" (A-79);

(6) the absence of any anecdotal evidence of pay discrimination despite seven years of discovery with government resources available, which "casts considerable doubt on the plaintiffs' claims" (A-84-88); and

(7) Yeshiva's affirmative proof of the absence of gender-based salary determinations, both with respect to initial salaries and pay increments (A-82-83).

C. *Sobel II: Court of Appeals' Remand*

On July 1, 1986, during the pendency of Dr. Sobel's appeal, this Court decided *Bazemore*. In a *per curiam* decision, the Court of Appeals directed the District Court to reconsider its decision in *Sobel I*, because at the time it rendered that decision the District Court did not have the benefit of the views of the Supreme Court in *Bazemore*. In remanding, the Second Circuit directed that the court below reconsider its decision "particularly with respect to the significance of pre-act discrimination and the evidentiary weight to be afforded multiple regression analysis. . . ." (A-48.)

D. *Sobel III: Sobel I Reaffirmed Upon Remand*

The District Court, on remand, reconsidered the evidence in light of *Bazemore*, adhered to its earlier decision, and directed entry of judgment for Yeshiva. The District Court began its opinion on remand by comparing the facts of this case with those in *Bazemore*. Noting that *Bazemore* involved admitted systemic pre-Act racial discrimination, the Court found that "[i]n the instant action, little evidence was offered to establish if, or how, the defendant discriminated against women prior to 1972, the year in which Title VII became applicable to universities." (A-38.) The Court then reviewed the basic failures in plaintiffs' case: "Besides the weakness of the statistical evidence and the almost total absence of anecdotal proof of discrimination, the evidence presented by the defendant revealed a decentralized administration with responsibility for salary decisions delegated to department heads, and an absence of motive or opportunity to discriminate against highly trained professionals in a competitive market. . . ." (A-39 n.9.)

In reevaluating the weight to be afforded multiple regression analyses in light of *Bazemore*, in accordance with the Second Circuit's direction, the District Court initially refuted plaintiffs' contention on appeal that it had "rejected" plaintiffs' statistsical analyses at trial. (A-41.) "[W]ith a single exception [not relevant to this petition], all of the plaintiffs' multiple regressions *were* received in evidence." (*Id.*) (emphasis in original).

Summarizing plaintiffs' revised position on remand, the District Court stated: "They contend that *Bazemore* requires that multiple regression analyses not only be admitted and considered by the Court, but also be accepted." (*Id.*) The District Court disagreed, holding that "*Bazemore* does not stand for that proposition." (*Id.*) The District Court stated that *Bazemore* "instructs us to consider multiple regression analyses regardless of the omission of arguably relevant variables, ***but***, to weigh them in light of all evidence presented by both sides. This is precisely the consideration we gave the plaintiffs' regressions." (A-42) (emphasis in original).

Having again reviewed plaintiffs' statistical evidence, the Court found it to be "seriously flawed", and reiterated its conclusion in *Sobel I*:

> Although the plaintiffs correctly argued that, in order to make out a prima facie case, *they are not required to produce a perfectly designed or specified model, but rather one that only roughly controlled for the necessary considerations, the plaintiffs failed to produce a model that met even this lesser standard.*

(A-43) (emphasis supplied). Since plaintiffs' regressions "were virtually the only evidence presented with respect to the class", plaintiffs failed to satisfy their burden of persuasion. (*Id.*) Thus, the District Court, upon its examination of all the evidence from all parties, concluded that plaintiffs had not proven their case.[26] (A-44.)

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[26] Despite the apparent conclusiveness of these observations, the District Court held that adherence to its earlier decision was appropriate for a wholly separate, procedural reason. Thus, the Court reiterated its ruling in *Sobel I* that by switching their theory of liability from disparate treatment to disparate impact after seven years of discovery and toward the end of the three-week trial, plaintiffs had severely prejudiced Yeshiva. (A-40-41.) In *Sobel III*, the District Court said that "[t]he plaintiffs not only waited until the last minute

(footnote continued)

E. *Sobel IV*

In *Sobel IV*, the Second Circuit reversed the District Court, holding that (a) there was no "procedural bar" to plaintiffs' assertion of what the appellate court characterized as a "*Bazemore* claim"; (b) the District Court had not properly evaluated evidence of pre-Act discrimination on remand; (c) the District Court did not apply the correct standard in evaluating Yeshiva's objections to plaintiffs' regressions in *Sobel I* or *Sobel III*, in light of *Bazemore*; and (d) a new District Court judge should preside at a retrial of the action.

1. *Court Of Appeals Misinterprets Bazemore Regarding Pre-Act Discrimination*

Finding references in the pre-trial and trial record to the claim which the District Court barred, the Court of Appeals reversed the finding of a procedural bar, holding that Yeshiva could not have been inordinately surprised by plaintiffs' assertion of that claim. Moreover, styling plaintiffs' case on remand as a "*Bazemore* claim", the Second Circuit stated that labeling it as one of "disparate impact" or "disparate treatment" was inappropriate since it was neither (or both):

> . . . the distinction between "disparate treatment" and "disparate impact" cases drawn by the district court artificially and unrealistically pigeon-holed plaintiffs' claim.

(A-9.) (*See also id.* at 17-18.) Departing from long-established precedents of this Court, the Court of Appeals stated that plaintiffs "would sustain a disparate treatment claim, even absent explicit proof of discriminatory motive."[27] (A-19.)

Finally, the Court defined the issue in the case:

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to assert their disparate impact claim, they presented scant evidence to support such a claim, and even that was flawed." (A-40.) Accordingly, the Court, noting that *Bazemore* would have no effect on this procedural ruling, reaffirmed its decision to dismiss plaintiffs' pay claim. (*Id.*) (*See also* A-89.)

[27] A disparate treatment claim requires proof that the defendant intended to discriminate. *International Brotherhood of Teamsters* v. *United States* ("*Teamsters*"), 431 U.S. 324, 335 n.15, 336 (1977). A disparate impact case is one in which the plaintiff alleges that a facially neutral test or employment criterion which disproportinately disqualifies a protected class from employment, promotion, or the like, is not job related. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

> After *Bazemore*...the point is not whether Yeshiva had to remedy time-barred discrimination (which would be pre-1974), but rather whether it had to remedy discrimination in the limitations period but which originated prior to the application of Title VII to universities in 1972.

(A-12.) Thus, despite substantial trial evidence that there was no salary discrimination as of the limitations date in 1974, and therefore no "carryover" into the actionable time period, the Court of Appeals held that the District Court erred in focusing insufficiently on the "crucial question" of whether there had been pre-1972 salary discrimination. (A-20.)

2. *Court Of Appeals Revokes District Court Discretion To Weigh Probative Value Of Unreliable Regressions*

Citing *Bazemore*, the Second Circuit ruled that the trial court had not applied the correct standard of proof in evaluating Yeshiva's criticisms of plaintiffs' analyses. (A-27.) Thus, the Second Circuit held that the District Court erred in reducing the weight it accorded plaintiffs' studies based upon the District Court's finding that those studies did not even come close to mimicking Yeshiva's pay criteria. (A-32.)

At trial, Yeshiva proved that the various omitted quantifiable variables were principal determinants of pay; that male physician-teachers on average received higher ratings than their female counterparts in 16 of 20 quantifiable pay criteria; that male faculty were likely to have superior results in the non-quantifiable categories; and that as more and more relevant variables were added to plaintiffs' regressions the sex coefficients became smaller and smaller. (A-75-76.) Nevertheless, the Court of Appeals held that with respect to omitted variables, Yeshiva's experts "simply criticized plaintiffs' failure to include them, offering no reason, in evidence or analysis, for concluding that they were correlated with sex and therefore were likely to affect the sex coefficient." (A-28.)

The Court of Appeals directed that on remand the District Court can discount the weight to be accorded plaintiffs' regression analyses *only* if Yeshiva can show that any "missing variable is a determinant of salary *and* correlates with sex...." (A-32) (emphasis supplied). Thus, the Court appears to have ruled that plaintiffs' statistical evidence, which the District Court found had

not even "roughly controlled for necessary considerations", is to be deemed conclusive unless Yeshiva proves not only that crucial variables were omitted, but that the omitted variables favored men.

3. *Court Of Appeals Remands To A Different District Judge*

Finding that the District Judge who had been assigned to the case for twelve years "conducted a thorough and searching inquiry after what must have seemed endless discovery, and made detailed findings in his opinion of *Sobel I*", the Court of Appeals nevertheless ordered that the case be reassigned to a different judge on remand because after *Bazemore* "his efforts...became inadequate." (A-33.) While recognizing that reassignment is an "extraordinary remedy", the Second Circuit, without further explanation, removed the District Judge, and remanded for additional discovery and a retrial. (*Id.*)

REASONS FOR GRANTING THE WRIT

I

THE SECOND CIRCUIT MISINTERPRETED AND CONTRADICTED SUPREME COURT AUTHORITY BY ELIMINATING THE DISTRICT COURT'S DISCRETION TO WEIGH THE PROBATIVE VALUE OF FLAWED STATISTICAL EVIDENCE, BY CREATING A PRESUMPTION THAT SUCH EVIDENCE HAS PROBATIVE VALUE, AND BY SHIFTING THE RISK OF NON-PERSUASION TO A TITLE VII DEFENDANT

After a lengthy trial and reconsideration, the District Court found that plaintiffs' statistical evidence was insufficient to prove that Yeshiva discriminated against women. (A-43-44.) The Second Circuit reversed, holding that the trial court had committed error in reducing the probative weight of plaintiffs' incomplete regression analyses. (A-27.) According to the Second Circuit, the burden should have been on Yeshiva to prove that more complete analyses than plaintiffs' would have shown smaller pay disparities; otherwise, plaintiffs' statistical evidence should have been shielded from Yeshiva's attack on its probative value. (A-29-30.)

The Second Circuit's ruling constitutes an ill-conceived extension of *Bazemore*, and squarely conflicts with rulings by the Seventh and Ninth Circuits. *See EEOC v. Sears, Roebuck & Co.*

("*Sears*"), 839 F.2d 302 (7th Cir. 1988); *Penk v. Oregon State Board of Higher Education* ("*Penk*"), 816 F.2d 458 (9th Cir.), *cert. denied*, ____U.S.____, 108 S. Ct. 158 (1987). The Second Circuit's decision also conflicts with established precedent placing the burden of proof on plaintiffs to show that their statistical model is sufficiently probative to support a finding of discrimination. *Bazemore*, 106 S.Ct. at 3009; *New York City Transit Authority v. Beazer*, 440 U.S. 568, 584-87 (1979).

There was no dispute in this case (nor is there in decisional law generally) that the probative value of statistical evidence depends on the accuracy with which the statistical model accounts for, or "mimics", actual determinants of pay. (A-63-64.) *See Penk*, 816 F.2d at 464-65; *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 730 (8th Cir. 1982). The District Court admitted plaintiffs' studies, found that they excluded important pay determinants at Yeshiva, and accordingly reduced their probative force. (A-43, 74-78.) The District Court ultimately weighed plaintiffs' and defendant's evidence as a whole (including plaintiffs' flawed regressions), and found that, in light of the total evidence, plaintiffs had not carried their burden of persuasion. (A-44, 88.) The Second Circuit reversed and directed that on remand the District Court should discount the weight to be accorded plaintiffs' incomplete regression analyses *only* if Yeshiva can show that any "missing variable is a determinant of salary and correlates with sex...." (A-32.) The Court of Appeals stated: "We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis." (A-27-28.)

The implications of this ruling are extraordinary. First, the ruling renders irrelevant, possibly even inadmissible, proof that a regression analysis is less probative because it omits significant variables without accompanying proof of a direct sex linkage to the omitted variables. Second, it improperly shifts the risk of nonpersuasion from the party offering the proof to the party against whom it is offered. Furthermore, where, as here, significant pay determinants are non-quantifiable, and therefore proof of a direct effect on the sex coefficient is impossible, it creates an irrebuttable presumption that the obviously flawed statistics and their

resultant sex coefficients are correct and meaningful. The logical result of the Second Circuit's decision is that, in actions involving professionals and other employees who are evaluated largely upon qualitative criteria which cannot be quantified, plaintiffs can offer meaningless statistical proof (as in *Sobel*) and defendants will be defenseless against it. The societal ramification of this ruling is that universities and other employers of professionals will avoid compensation decisions based upon non-quantifiable elements of quality or merit.

The Second Circuit apparently gleaned this approach from *Bazemore* (A-27); but *Bazemore* is to the contrary. There, this Court considered whether a plaintiff's multivariant regression analysis was *inadmissible* because it omitted certain determinants of salary, and ruled that "a regression analysis that includes less than all measurable variables may serve to prove a plaintiff's case." 106 S. Ct. at 3009.

The *Bazemore* decision emphasized that plaintiffs' analysis accounted for all major determinants of pay. 106 S. Ct. at 3008-09. This Court remanded to the Fourth Circuit to determine whether the District Court's dismissal of the discrimination claim was erroneous once plaintiffs' regression analysis was considered. 106 S. Ct. at 3010-11. With respect to the weight to be accorded a misspecified analysis, *Bazemore* held that the less complete the analysis, the less probative it is, and that an analysis may be "so incomplete as to be inadmissible as irrelevant" — holdings diametrically opposed to the entire theory of *Sobel IV*. 106 S.Ct. at 3009 n.10. According to *Bazemore*, in weighing a plaintiff's regression analysis, a court must evaluate "all the evidence presented by both the plaintiff and the defendant" to determine whether unlawful discrimination occurred. 106 S. Ct. at 3009. This is precisely what the District Court here did. (A-42.)

This Court has consistently held that a trial court must weigh a regression analysis like any other evidence:

> We caution only that statistics are *not* irrefutable; they come in infinite varieties and like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.

Teamsters, 431 U.S. at 340 (emphasis supplied).[28]

The authority cited in *Bazemore* regarding the proper burden of proof in a Title VII case was *Burdine*. In *Burdine*, this Court held that the Fifth Circuit imposed too heavy a burden on a Title VII defendant by requiring it to prove the existence of nondiscriminatory reasons for terminating plaintiff and to prove that the person retained in plaintiff's position had superior qualifications. 450 U.S. at 259-60. The Court observed that in order to satisfy its burden in a Title VII action, a defendant need do no more than produce evidence sufficient to raise a genuine issue of fact as to whether it discriminated against plaintiff. The ultimate burden of proof is at all times upon plaintiff. *Id.* at 254-56.

Sobel IV is wholly inconsistent with *Burdine*. The Second Circuit improperly shifted the burden of proof by requiring Yeshiva to provide a nondiscriminatory explanation for plaintiffs' showing of a pay disparity through proof that female faculty received less pay than their male counterparts only to the extent that females were less productive. To the degree that the omitted productivity variables are, in this case, non-quantifiable, the burden imposed on Yeshiva cannot be satisfied.

The plaintiff's burden of proof in light of *Bazemore* was discussed in recent decisions of the Seventh and Ninth Circuits, both of which are in conflict with the Second Circuit's opinion in *Sobel IV*. *Sears*, *supra*; *Penk*, *supra*.[29] In *Sears*, the Seventh Circuit affirmed the

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[28] When a plaintiff uses a statistical disparity in pay to argue that an employer's salary decisions are discriminatory, the employer is free to argue that the numbers generated by the statistics do not prove discrimination. *Teamsters*, 431 U.S. at 360 (employer may demonstrate that the evidence is inaccurate or insignificant). A District Court, as the trier of fact, has discretion to decide whether plaintiff's statistical model is probative of discrimination when weighed against defendant's evidence. *Texas Department of Community Affairs v. Burdine* ("*Burdine*"), 450 U.S. 248, 257 (1981).

[29] The Fourth Circuit is also in conflict with the Second Circuit's approach, although no case decided since *Bazemore* has reached the issue. *See Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 580 (4th Cir.), *cert denied*, 434 U.S. 904 (1977) (plaintiff's statistical evidence of faculty pay disparity was insufficient to prove gender-based discrimination, due to the absence of evidence comparing salaries by discipline or department); *Presseisen*, 442 F. Supp. at 619 (rejecting plaintiff's argument of pay disparity based on multiple regression analysis because the statistics were incomplete and unpersuasive when compared with the college's analysis).

District Court's decision that plaintiffs' regression analyses were entitled to little weight because they did not account for important characteristics used to determine promotions. 839 F.2d at 326-28. The Seventh Circuit observed that *Bazemore* did not relieve a plaintiff's burden of justifying its choice of variables: "We think that the EEOC's failure to support its choice of variables in this case casts a shadow on the probative value of the regression analyses incorporating those variables."[30] *Id.* at 326. Thus, according to *Sears*, plaintiff bears the risk of non-persuasion where non-quantifiable factors are shown to be important.

The District Court in *Sears* recognized that non-quantifiable variables such as physical appearance, communicative ability, and friendliness were important factors in the evaluation of employees, and "found that to the extent the EEOC's regression analyses did not incorporate these factors, they were entitled to less weight." *Id.* at 327. Because this finding went "to the probative value rather than the relevancy of the regression analyses," the Seventh Circuit held that the District Court's decision was consistent with *Bazemore*. *Id.*

In *Sears*, the Seventh Circuit gave great deference to the District Court's "credibility-based factual determinations" that the variables chosen were inadequate to model reality. *Id.* at 326. Furthermore, the District Court was held to have correctly considered defendant's criticisms that plaintiff's model did not reflect all determinants of promotion at the company, even though those criticisms were not based on statistical analysis. *Id.* at 313-14. In the case at bar, the Second Circuit has suggested that the trial court ignore Yeshiva's arguments that plaintiffs' model is misspecified unless, employing the same statistical model, Yeshiva can show a reduced sex coefficient. (A-28.)

The Second Circuit has also placed itself into a direct conflict with the Ninth Circuit's decision in *Penk*, a case closely analogous to the case at bar. There, the Ninth Circuit endorsed the concept, as stated by the District Court, that "in order to prevail,

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[30] In *Sears*, the Court noted with disfavor that plaintiff's experts were unfamiliar with the actual determinants of promotions in retail sales. *Id.* Here, plaintiffs' experts were similarly unfamiliar with the more complex criteria which determine pay in medical academia and admitted that they did not even attempt that task; the EEOC's trial counsel selected the variables for them.

plaintiffs must present statistical evidence that models the decision-making processes under study." *Penk* v. *Oregon State Board of Higher Education*, 36 EPD ¶ 36,711, 36,727 (D.Ore. 1985). By their omission of significant non-quantifiable variables, the Court held that plaintiffs failed to sustain their burden. *Id.*

In *Penk*, a class consisting of female faculty submitted regressions showing pay disparities, but the Court of Appeals affirmed the District Court's holding that the regressions were inadequate because "important decision-making variables [such as teaching quality, community and institutional service, and quality of research and scholarship] were either missing or inadequately represented." 816 F.2d at 465 (bracketed material supplied). In *Penk*, the Court of Appeals acknowledged that academic employment decisions "properly include a high regard for subjective personnel qualities and characteristics." 816 F.2d at 464. Neither plaintiff's nor defendant's "statistical evidence accurately reflected the complex factors and motivations guiding . . . salary decisions." *Id.*

Penk and *Sears* are consistent with *Burdine* and *Bazemore*; *Sobel IV* is not.[31] As one distinguished commentator has noted:

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[31] Two District of Columbia Circuit cases have adopted a position somewhat more in accord with the Second Circuit than with the Seventh or Ninth, but on entirely different facts. In *Segar* v. *Smith*, 738 F.2d 1249, 1277 (D.C. Cir. 1984), *cert. denied sub nom. Meese* v. *Segar*, 471 U.S. 1115 (1985), the Court noted that since the employer had superior knowledge of the decision-making process challenged by plaintiffs as discriminatory, it was sound policy to require it to articulate what non-discriminatory factor omitted from a regression caused a pay differential. *Id.* In contrast, at a university, where pay is determined largely on the basis of qualitative judgments and non-quantifiable factors about which plaintiffs and defendants are equally knowledgeable, there is no policy basis for shifting the burden of production and the risk of non-persuasion to the defendant. In the case at bar, both parties had equal access to relevant information. Indeed, certain class members, as chairpersons, made salary decisions. More recently, in *Palmer* v. *Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987), the D.C. Circuit stated a "corollary to the *Bazemore* rule": "in most cases a defendant cannot rebut statistical evidence by mere conjectures or assertions, without introducing evidence to support the contention that the missing factor can explain the disparities as a product of a legitimate, nondiscriminatory selection criterion." The D.C. Circuit remanded to the District Court to reconsider its refusal to credit plaintiff's statistical evidence in light of the Court of Appeals' interpretation of *Bazemore*. *Id.* at 106. Notably, the D.C. Circuit left the trial court discretion to evaluate the evidence in light of its instructions.

> To shift the burden of persuasion to the defendant...on the strength of a poorly fitted regression violates the burden of proof standards enunciated in *Texas Department of Community Affairs v. Burdine* and *Furnco* [*Construction Corp. v. Waters*, 438 U.S. 567 (1978)], even if the defendant has offered no better fitting equation. The defendant does not have to.

Campbell at 1309 (footnote omitted) (bracketed material supplied).

The ultimate issue facing plaintiffs in this, as in any Title VII case, is whether, in light of the totality of the evidence, it was more likely than not that Yeshiva discriminated against them. *Bazemore*, 106 S.Ct. at 3009. The Second Circuit, exalting statistics, has wrongly shifted the risk of non-persuasion to Yeshiva, and its decision exacerbates a conflict between the circuits as to the probative value of flawed regression analyses. The Supreme Court should grant this petition to resolve the conflict and to provide necessary guidance to the lower courts.

II

SOBEL IV CONFLICTS WITH *BAZEMORE* AND *UNITED AIR LINES, INC. V. EVANS* BY REQUIRING A FINDING ON ALLEGATIONS OF PRE-ACT DISCRIMINATION WHEN THERE WAS NO EVIDENCE OF DISPARATE PAY DURING THE ACTIONABLE TIME PERIOD

The Court of Appeals failed to harmonize the Supreme Court's decision in *United Air Lines, Inc. v. Evans* ("*Evans*"), 431 U.S. 553 (1977), with *Bazemore*, and therefore overlooked decisive factual evidence upon which the District Court should have been affirmed. Yeshiva's theory at trial was that there could not have been actionable discrimination since there was no evidence of discrimination immediately prior to the actionable time period and non-discriminatory treatment throughout that time period. *Bazemore*, decided after trial, made Yeshiva's theory no less appropriate.

The limitations date, December 20, 1974, fell within the 1974-75 academic year and salaries for that year were therefore set in the pre-limitations period. Plaintiffs' "rebuttal" analysis for the 1974-75 academic year showed no statistically significant pay

differentials in that academic year. (A-69, Table 2.) Even plaintiffs' study of only pre-1972 hires showed no statistical significance in 1974-75. (A-71, Table 4.) Yeshiva's analyses also showed no statistically significant pay differentials in the 1974-75 academic year. Therefore, any contention that plaintiffs were the victims of *Bazemore*-type "carry over" discrimination was refuted by the total absence of evidence of pay disparities immediately prior to December 20, 1974.

In *Sobel IV*, the Second Circuit rejected this approach, criticizing the District Court for rendering a decision upon a record which "is incomplete on the crucial question of pre-1972 salaries at Yeshiva." (A-27.) The Court held:

> After *Bazemore*, the point is not whether Yeshiva had to remedy time-barred discrimination (which would be pre-1974) but rather whether it had to remedy discrimination in the limitations period but which originated prior to the application of Title VII to universities in 1972.

(A-12.) The Court of Appeals' definition of the issue as set forth above appears to be in direct conflict with *Evans*:

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed.

Evans, 431 U.S. at 558. *See also Bazemore*, 106 S. Ct. at 3007 n.6. Thus, the District Court had properly focused on the question of whether plaintiffs proved that there were gender-based salary disparities on December 20, 1974 and thereafter. Having found insufficient evidence of such disparities, it was unnecessary for the District Court to have made a finding on alleged pre-1972 discrimination, particularly since the evidence showed a successful effort had been made to remedy any salary disparities prior to 1974.

Since there was no evidence of pre-limitations discrimination, the District Court's alternative holding, that plaintiffs failed to prove their "continuing effects" claim, was correct and should have been affirmed.

III

DEFINING THE EXTENT OF THE COURT OF APPEALS' AUTHORITY TO REASSIGN DISTRICT JUDGES ON REMAND HAS WIDE IMPLICATIONS FOR THE ORDERLY ADMINISTRATION OF JUSTICE IN THE FEDERAL COURTS; REASSIGNMENT IN THE ABSENCE OF A MOTION TO RECUSE OR MANDAMUS VIOLATES 28 U.S.C. § 137 AND EXCEEDS THE COURT OF APPEALS' AUTHORITY UNDER 28 U.S.C. § 2106; THIS COURT HAS NEVER RULED UPON THE PROPRIETY OF SUCH REASSIGNMENT ORDERS

Directions by the Courts of Appeals to reassign a new District Court judge on remand, which in most cases violate the statutory delegation of powers as between the District and Circuit courts, are becoming increasingly prevalent. *See* J. Weinstein, *The Limited Power Of The Federal Courts of Appeals To Order A Case Reassigned To Another District Judge* (Weinstein), __ F.R.D. __ (__, 1988).[12] This Court has never addressed the permissible limits within which a Court of Appeals may order that a case be reassigned on remand.

Sobel IV is an egregious usurpation by an appellate court of the District Court's assignment authority because there was no motion to recuse below, no writ of mandamus at the appellate level, no application by any party to reassign the case, no finding of bias, conflict of interest or persistent misapplication of governing law, no citation to the statutory authority under which the Second Circuit acted, and little reasoned justification for the reassignment.[13] While recognizing that the removal of a District Judge on remand is an " 'extraordinary remedy. . .[to] be reserved for the extraordinary case' " (A-33-34, *quoting United States* v. *Robin*, 545 F.2d

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[12] Weinstein has been accepted for publication in Federal Rules Decisions with an anticipated publication date of August, 1988.

[13] *See P. Lushing and L. Zwiefach, Commentary to the Guidelines For The Division Of Business Among United States District Court Judges For The Eastern District of New York Pursuant to 28 U.S.C.* § 137 ("Commentary") which will be published as an appendix to Weinstein (characterizing as "dubious" the Court of Appeals' assertion of authority to have ordered reassignment in *Sobel IV*); Weinstein ("The reassignment order in *Sobel* v. *Yeshiva University*, 839 F.2d 18 (2d Cir. 1988), and other recent court of appeals cases violate [the normal practice] where neither a motion to recuse nor mandamus was utilized.").

775 (2d Cir. 1976)), the Court of Appeals nevertheless held, without meaningful explanation, that "this case is, indeed, extraordinary." (A-34.) The Court removed the judge who supervised seven years of discovery, made scores of pre-trial rulings, presided over the lengthy trial, observed the demeanor and evaluated the credibility of 18 witnesses, and authored the oft-cited 27 page decision in *Sobel I* as well as *Sobel III*.

Though the Second Circuit held that the District Court committed error in *Sobel III*, the Court of Appeals' findings concerning the trial judge's actions are contrary to any suggestion that the judge repeatedly or flagrantly misapplied the law. To the contrary, the Court commented that the judge "conducted a thorough and searching inquiry after what must have seemed endless discovery, and made detailed findings in his opinion in *Sobel I*." (A-33.) The Court also noted that the District Court correctly applied the governing law at the time its decision in *Sobel I* was issued, but, fortuitously for plaintiffs, "*Bazemore* . . . represented an important and dramatic shift in Title VII law." (A-8.) Thus, at worst, the trial judge simply misapplied this dramatically new law in a case of first impression within the Second Circuit.[34]

Neither did the Court of Appeals find, or even suggest, that bias was a ground for its decision.[35] During the entirety of the case, no party requested that the judge recuse himself or that he be removed.

The Court's reassignment order, *sua sponte*, was grounded simply, and solely, upon one panel's perception that, after *Bazemore*, the judge's efforts "became inadequate." (A-33.) Reassignment on this basis is without any statutory support, and indeed, contravenes 28 U.S.C. § 137 which vests the power to assign individual trial-level judges in the District Court:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.

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[34] Bare errors of law have usually been held an insufficient basis for reassignment. *See Davis & Cox* v. *Summa Corp.*, 751 F.2d 1507, 1523 (9th Cir. 1985); *United States* v. *Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979).

[35] The judge had ruled at least as many times for plaintiffs as for Yeshiva during the lengthy litigation. Indeed, the District Court's initial decision on the merits found Yeshiva liable for discrimination relating to its pension plan. (A-51.)

> *The chief judge of the district court shall* be responsible for the observance of such rules and orders, and shall divide the business and *assign the cases* so far as such rules and orders do not otherwise prescribe.
>
> If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.

(Emphasis supplied.)[36]

The Courts of Appeals, like the District Courts (and unlike the Supreme Court[37]) are products solely of statute and therefore

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[36] The last paragraph of Section 137, vesting certain powers in the "judicial council of the circuit", affords no supervisory powers to individual panels of appellate judges sitting in review of specific cases. First, that paragraph, either alone or in conjunction with 28 U.S.C. § 332 (setting forth the composition and functions of the judicial councils) and 28 U.S.C. § 372(c) (conferring upon the judicial councils the authority to resolve complaints of judicial misconduct), places no limitation on the District Court's authority to conduct its business and, in any event, is effective only "[i]f the district judges. . . are unable to agree upon the adoption of rules or orders. . . ." (The United States District Court for the Southern District of New York has adopted Rules For The Division Of Business Among District Judges). Furthermore, judicial councils include both Court of Appeals and District Court judges. *See* 28 U.S.C. § 332(a)(1).

[37] The United States Constitution accords the Supreme Court constitutional status, with inferior courts to be created by Congress as needed. Constitution, Art. III, Sec. 1. The Supreme Court may well have general supervisory powers, either of constitutional derivation or as successor to the Court of Kings Bench. Weinstein. These supervisory powers have, in rare instances, been deemed to include the reassignment of a District Court judge. *See, e.g., Offutt* v. *United States*, 348 U.S. 11 (1954), in which the Court noted its "supervisory authority" and suggested that on remand "the judge who imposed the sentence herein should invite the [Chief] Judge of the [District Court] to assign another judge to sit in the second hearing. . . ." *Id.* at 15 (brackets in original). Other reassignment orders issuing from this Court have been more direct, frequently prompting strenuous dissents. *See, e.g., Codispoti* v. *Pennsylvania*, 418 U.S. 506, 530 (1974) (in "a federal case, . . . this Court, in the exercise of some perceived wisdom of the appropriate policy to be followed in the administration of justice in the federal courts, . . . may require retrial before another judge.") (citations omitted) (J. Rehnquist dissenting); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 161 (1967) ("For this Court, on its own motion, to disqualify a trial judge in the middle of a case because it disagrees with his 'philosophy' is not only unprecedented, but incredible.") (J. Stewart dissenting).

have only those powers specifically conferred upon them by Congressional enactment.[38] The cases which cite a statutory basis for the power of appellate reassignment often refer to 28 U.S.C. § 2106 as the source of this authority.[39] *See, e.g., Smith* v. *Mulvaney*, 827 F.2d 558, 562 (9th Cir. 1987); *United States* v. *Robin* ("*Robin*"), 553 F.2d 8, 9 (2d Cir. 1977) (*en banc*). Section 2106 sets forth the specific powers which Congress has conferred on the federal appellate courts, which do not include the power to assign judges of the District Court to individual cases. No implied power to assign may be found in 28 U.S.C. § 2106 because that power is expressly delegated to the District Courts in 28 U.S.C. § 137. *See* Weinstein (Section 2106 "does not authorize the appellate court to say what judge in a multijudge court shall preside – that issue is covered by Section 137.").[40]

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[38] In 1891, Congress created an intermediate appellate level court below the Supreme Court. Circuit Court of Appeals Act, Mar. 3, 1891, ch. 317, 26 Stat. 826. As Judge Weinstein has observed, "no denigration of the general administrative power of the district courts to control themselves was accomplished by creation of the intermediate federal appellate system." Weinstein.

[39] 28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

[40] This is not to suggest that the Courts of Appeals are wholly without authority to exercise administrative control of District Court judges under appropriate circumstances; these circumstances, however, are narrowly prescribed by statute and do not exist in the vast majority of recent cases involving appellate reassignment orders. Thus, a District Court judge may be removed by a Court of Appeals upon a writ of mandamus, but only upon a finding of deliberate and persistent breaches of law, amounting to the judge's "open defiance" of applicable rules, *Will* v. *United States*, 389 U.S. 90, 95-96, 102 (1967), or in the course of traditional appellate review of a District Judge's ruling under applicable disqualification statutes, but only if the District Judge has first ruled on the issue, *see* 28 U.S.C. § 144; 28 U.S.C. § 455. Procedures applicable to mandamus also contemplate an opportunity for the District Court judge to be heard. *See* Fed. R. App. P. 21. In this case, not only was no notice given to the District Judge, but, because the Second Circuit acted on its own motion, there was no opportunity for the litigants to make a record.

Certain appellate panels have developed a body of decisional law permitting appellate reassignment based upon assertions of inherent supervisory authority over the trial courts. *See*, *e.g.*, *United States* v. *Sears, Roebuck & Co.*, 785 F.2d 777 (9th Cir), *cert. denied*, __U.S.__, 107 S.Ct. 580 (1986); *United States* v. *Ritter*, 273 F.2d 30 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960).[41] Not surprisingly, the cases which have developed out of this amorphous concept display a patchwork of inconsistent and increasingly liberalized standards for reassignment, even within the individual circuits.[42]

Sobel IV presents a classic example of overreaching by a Court of Appeals and has catalyzed District Court criticism of the practice. *See* Commentary; Weinstein. Chief Judge Weinstein, of the Eastern District of New York, citing *Sobel* among other decisions, has observed that:

> [R]eassignment interferes with the docket of the district court where the district judge has neither exceeded his or her authority nor refused to exercise that authority. . . , nor demonstrated an inability to execute the appellate mandate. . . . It is a gratuitous gesture without authority to support it except in recent appellate decisions that themselves lack adequate legal basis.

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[41] Recognizing the broad mandate for District Court self-governance in Section 137, Congress has enacted specific legislation in instances where it has chosen to grant to the Courts of Appeals certain powers concerning District Court administrative matters. *See*, *e.g.*, 28 U.S.C. § 152 (power to appoint bankruptcy judges). Such statutes would be unnecessary were the Courts of Appeals possessed of inherent authority over District Court administration.

[42] *See*, *e.g.*, *Sobel IV* (reassigned because District Judge's efforts "became inadequate"); *Outley v. City of New York*, 837 F.2d 587 (2d Cir. 1988) (no explanation); *United States v. Pugliese*, 805 F.2d 1117 (2d Cir. 1986) (reassignment despite denial of recusal motion); *United States* v. *Corsentino*, 685 F.2d 48 (2d Cir. 1982) (where the need for resentencing arose entirely through prosecutorial misconduct); *see also Robin*, 553 F.2d at 9 (setting forth the factors to be considered in exercising reassignment authority since "our expressions on the subject have been fragmentary [and] an erroneous impression may have been left. . ."). *Compare Koller* v. *Richardson-Merrell, Inc.*, 737 F.2d 1038, 1069 (D.C. Cir. 1984), *vacated and remanded*, 472 U.S. 424 (1985) (J. Richey concurring: "The time has come to implement the mandate of Congress and remand cases to a different trial judge *only* on the basis of evidence that would require recusal under 28 U.S.C. §§ 144 and 455.") (emphasis in original).

Weinstein. Echoing the sentiments of Judge Richey of the District Court for the District of Columbia, Judge Weinstein has stated that:

> It creates "the potential for havoc...upon the effective administration of justice in the trial court." *Koller* v. *Richardson-Merrell*, 737 F.2d 1038, 1067 (D.C. Cir. 1984) (Richey, J., concurring), *vacated on other grounds*. 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed. 2d 340 (1985).

Id. In *Koller*, Judge Richey suggested that continued countenance of reassignment orders, other than as specifically prescribed by Congress, will open:

> a "Pandora's Box" for countless baseless attacks upon a defenseless judiciary whose independence is essential to the preservation of this republic.[43]

737 F.2d at 1069.

The Court should grant this petition to finally resolve the debate as to when it is proper for a Court of Appeals to reassign a case to a different District Court judge on remand.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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On the Petition.

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[43] Since Article III of the Constitution is to "be read with a view to the protection of judicial independence even at the cost of enduring partisan judges", the issue raised by the Court of Appeals' reassignment order may well be of constitutional magnitude. *See* W. Rehnquist, *Political Battles For Judicial Independence*, 50 Wash.L.Rev. 835, 842 (1975).

APPENDIX

APPENDIX A

Edna H. SOBEL, M.D., and Bella C. Clutario, M.D., on behalf of themselves and other professional faculty members employed by the defendant, Yeshiva University, Plaintiffs,

Edna H. Sobel, M.D., on behalf of herself and other professional faculty members employed by the defendant, Yeshiva University, Plaintiff-Appellant,

Equal Employment Opportunity Commission, Plaintiff-Intervenor,

v.

YESHIVA UNIVERSITY, Defendant-Appellee.

No. 204, Docket 87-7373.
United States Court of Appeals, Second Circuit.

Argued Oct. 14, 1987.

Decided Feb. 4, 1988.

Female physicians on faculty of university's college of medicine brought sex discrimination action. The District Court, 566 F.Supp. 1166, dismissed claim of discrimination, and physicians appealed. The Court of Appeals, 797 F.2d 1478, reversed and remanded for reconsideration in light of Supreme Court decision. On remand, the District Court, 656 F.Supp. 587, Goettel, J., held that plaintiffs failed to disprove prima facie case of disparate treatment with respect to salary based on multiple regression analysis, and plaintiffs appealed. The Court of Appeals, George C. Pratt, Circuit Judge, held that: (1) plaintiffs were not precluded from raising disparate impact claim; (2) considerable evidence supported plaintiff's claim of continuing effects of pre-Title VII salary discrimination; and (3) remand to a different district judge was appropriate in light of district court's finding of procedural bar to plaintiffs' continuing effects

claim which was so contrary to the record as to suggest a strong desire to escape dealing with the case again.

Reversed and remanded.

Eleanor Jackson Piel, New York City, for plaintiff-appellant.

Daniel Riesel, New York City (Lawrence R. Sandak, Robert R. Reed, Sive, Paget & Riesel, New York City, of counsel), for defendant-appellee.

Before KEARSE, PIERCE, and PRATT, Circuit Judges.

GEORGE C. PRATT, Circuit Judge:

In his masterpiece *Bleak House*, Charles Dickens painted a scathing portrait of the hopeless complexity of the handling of cases in England's High Court of Chancery. Dickens wrote, "[T]hrough years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends. And we can't get out of the suit on any terms, for we are made parties to it ***." Mindful of the example of the never-ending litigation that marked Dicken's Chancery Court, it is with regret that we find it necessary to once again remand this nearly thirteen-year old action to the district court, for new proceedings which we can only hope will at last end the litigation between these parties.

This is a complicated sex discrimination class-action suit against Yeshiva University. The core complaint alleges that Yeshiva discriminated against women faculty members at its medical school, the Albert Einstein College of Medicine ("AECOM"), by paying them a lower salary on the basis of their gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The alleged violations run from 1974, the earliest date for which the statute of limitations had not run at the time plaintiffs filed suit in 1975, to 1979.

After seven years of discovery, trial began in September 1982, with plaintiffs' case being carried for the most part by the

intervenor, the Equal Employment Opportunity Commission ("EEOC"). After approximately three weeks of trial, the district judge took the matter under advisement, rendering his decision in June 1983, when he determined that plaintiffs had failed to establish a *prima facie* case of disparate treatment in faculty salaries, that their claim of disparate impact was procedurally barred, and that defendant's pension plan, based on sex-segregated mortality tables, was illegal. *Sobel v. Yeshiva University*, 566 F.Supp. 1166 (S.D.N.Y. 1983)(*"Sobel I"*). The last of these findings is not relevant to this appeal.

On appeal, this court remanded the case for reconsideration in light of the Supreme Court's intervening decision in *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986). *Sobel v. Yeshiva University*, 797 F.2d 1478 (2d Cir. 1986)(*"Sobel II"*). On remand, the district court adhered to its initial decision, concluding that the procedural bar it had initially found to preclude plaintiffs from raising their "disparate impact" claim was a sufficient independent basis for its original decision, *Bazemore* and this court's remand order notwithstanding. *Sobel v. Yeshiva University*, 656 F.Supp. 587 (S.D.N.Y. 1987) (*"Sobel III"*). Because we conclude that there was no "procedural bar", and that plaintiffs' *Bazemore* claim, whether it is characterized as one of "disparate treatment" or "disparate impact", deserves full and fair evaluation, we again remand, but this time for a new trial on that claim. For reasons discussed below, we direct that the case be reassigned to a different district judge.

BACKGROUND

In 1972, named-plaintiff Dr. Edna Sobel, a faculty member in the pediatrics department at AECOM, began to express dissatisfaction with her salary, which she contended was too low for a full professor of her experience and stature. She complained to her then department head, Dr. Lewis Fraad, and for the next two years received so-called "out-of-guideline" increases in salary. The second of these increases, however, was not sufficiently large to satisfy Dr. Sobel, and she initiated this lawsuit, having told Dr. Fraad that "It seems that I am going to have to sue to get appropriate pay." Trial Tr. at 1144-51.

The basic structure of AECOM's faculty and salary systems are set forth in *Sobel I*, with which we assume familiarity. *See Sobel I*, 566 F.Supp. at 1169-73. By the time of trial, Sobel had been joined by Dr. Bella Clutario as named plaintiffs. The class they represented had been reduced to full-time female faculty members with M.D. degrees employed by AECOM between 1974 and 1979, a group that numbered from 49 to 60 during each year out of a total full-time faculty that ranged from 204 to 295 during the period.

The salary received by any one faculty member was a result of numerous factors, some readily quantifiable and some inherently amorphous. The parties agreed on the importance of such factors as experience, numbers of publications in scholarly journals, and the department in which the doctor worked. They further agreed that the rank held by a particular faculty member (assistant profesor, associate professor, or full professor) was a factor influencing salary, although plaintiffs raised strong objections to its inclusion on grounds we will soon discuss.

The nub of the dispute, of course, was whether plaintiffs adequately established that when such legitimate factors were accounted for in the admitted disparity between the average salaries of male and female faculty members, there remained a difference that could be explained only by reference to the person's sex.

Plaintiffs attempted to demonstrate this proposition using a common statistical tool, multiple regression analysis, which is designed to isolate the influence of one particular factor – here, sex – on a dependent variable – here, salary. One of plaintiffs' expert witnesses, Dr. Orley Ashenfelter, testified that the plaintiffs' statistical model was designed to approximate the factors that influenced salary at AECOM, so that "any differences between the salaries of men and women that were not explained by the pertinent variables to be used in the model had to be the result of sex discrimination." *Sobel I*, 566 F.Supp. at 1174. As with any multiple regression analysis, the validity of the influence attributed to a particular variable will depend heavily on how accurately the model mimics the actual factors

influencing the dependent variable, salary. For example, if the model omits an important variable that affects salaries, the portion explained by that variable will seem to be unexplained, and thus may erroneously be attributed to sex. Conversely, if an extraneous factor is erroneously credited with influencing salary, it may serve to mask the effect of sex on faculty compensation.

After considerable wrangling, the parties were able to agree on virtually all of the data to be used in the studies to be done by their experts. The data base included the names of the several hundred M.D.s employed as faculty by AECOM during the relevant period, their salaries from year to year (and, therefore, the incremental year-to-year increases in salary of each faculty member), their rank or ranks during the period, the frequency of their publications, their experience, both at AECOM and as reflected in the number of years since they received their M.D.s, and various other information.

From this agreed-upon data base, the parties proceeded in different directions. From their studies, "plaintiffs' experts determined to their satisfaction that the salary differences disfavoring women were statistically significant (at the 0.05, or two standard deviation, level) for the year 1970 and the years 1973 through 1978." *Id.* at 1175.

Yeshiva's experts attacked both the adequacy of a multiple regression analysis generally in this sort of employment context, and the particular study done by plaintiffs' experts. Their conclusion, based on their own study of the data, was that there was no evidence of salary discrimination, either in the initial setting of salaries or in the annual wage increases. Further, they argued that, when the proper variables were included (and the improper ones excluded), even a multiple regression did not show a statistically significant salary disparity based on sex.

The district court largely accepted the conclusions of Yeshiva's experts. It found plaintiffs' regression analysis to be riddled with "major shortcomings". Among these was the failure adequately to deal with the relative disparity in salaries between faculty members in the clinical departments, which tend to be both

disproportionately male and higher paid, and in the "preclinical" departments, which were heavily female and relatively lowly paid. In addition, the district court faulted plaintiffs for failing to distinguish between clinicians who were primarily researchers and those whose primary activity was the practice of medicine, and for failing adequately to account for "inherent departmental stratification". Most important, the court concluded that plaintiffs' variables that attempted to act as proxies for the inherently amorphous impact of "productivity" on salary "failed to adequately account for the true productivity differences and that the consequential underadjustment for these differences resulted in an overestimate of the sex coefficients." *Id.* at 1179.

In order to introduce a variable that would at least approximate productivity, Yeshiva proposed, and the district court accepted, using the rank of the faculty member. Sobel strenuously objected to including rank as a variable, arguing that it was not an independent variable, because an individual's rank resulted from the same factors that determined salary increases. However, the district court believed rank served to capture intangible factors that did not affect the annual salary increase a faculty member received. *Id.* at 1180.

The plaintiffs also objected to using rank on a more fundamental ground. For the very reason the district court felt rank should be used—that it reflected intangible productivity factors—plaintiffs argued that there was a serious risk that *impermissible* factors would have entered into promotion decisions, and thus that rank, insofar as it determined salary, might reflect sex discrimination. Because of this risk, plaintiffs urged, "academic rank should have been included as an explanatory variable only where there was clear evidence that neutral and objective standards had consistently been followed and there was no chance that the decisions regarding rank had been affected by sexual discrimination." *Id.* The district judge concluded, however, "that promotions in rank *** were in fact based on merit and were not contaminated by elements of sexual discrimination." *Id.* (footnote omitted).

Based on these and other difficulties it had with plaintiffs' multiple regressions, the district court held that plaintiffs had failed to make out a case of disparate treatment in faculty salaries. One of the factors leading the court to adopt Yeshiva's view was that plaintiffs did not factor out the effects of discrimination in salaries that occurred before Title VII was made applicable to universities in 1972 ("pre-act"). Under its view of the law, discrimination originating in the pre-act period was not a valid basis for a current finding of a Title VII violation, and the trial court faulted plaintiffs' conclusion because their study "was not designed to analyze the extent to which salary differentials may have been the consequence of discriminatory acts that occurred" before 1972. *Id.* at 1182.

This view also led the district court to reject what it characterized as plaintiffs' "disparate impact" claim, which consisted of the contention that the women faculty members hired before 1972, who allegedly received discriminatorily low starting salaries, never "caught up" to their male counterparts. In the district court's view, this constituted a disparate impact claim because the mechanism for determining salary increases, the "guideline" system, which provided men and women with roughly equal raises in percentage terms, amounted to a facially neutral system that had the effect of keeping women's salaries on the AECOM faculty perpetually lower than men's. Such a facially neutral system that is alleged to have an effect that disproportionately harms a particular group is the essence of a "disparate impact" claim. *See generally Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2727, 53 L.Ed.2d 786 (1977).

As a general rule, faculty members received the "guideline" increase, which in some years was a simple percentage and in others was a percentage combined with a minimum raise in absolute terms. Some faculty members in some years received what were referred to at trial as "out-of-guideline" increases, normally given when a faculty member was able to convince his department head that his salary was inequitably low and that he should take up the professor's cause before the administration.

The district court rejected the disparate impact claim on two grounds. First, it found the argument procedurally barred, because plaintiffs had not raised it until late in the trial, after seven years of discovery; it thus seemed unfair to Yeshiva to face an entirely new claim so late in the game.

Second, the court found that any disparities in salaries perpetuated by the guideline system resulted from pre-1972 hires and pre-1972 salaries, which the court said "did not have to meet the standards established under Title VII." 566 F.Supp. at 1188.

While plaintiffs' appeal from this judgment was pending, the Supreme Court decided *Bazemore*, in which the Court held that a pre-act salary disparity that is carried over into the period following application of the act constitutes a violation of the act. As Justice Brennan wrote for the Court,

> A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, he is liable under that statute.

106 S.Ct. at 3006. *Bazemore* thus represented an important and dramatic shift in Title VII law. Most of the lower federal courts had interpreted the Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), as holding that employers did not have to equalize salaries that were discriminatory if the disparity originated prior to the application of Title VII. *See, e.g., Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 404 n.11 (2d Cir. 1981); *Farris v. Board of Educ.*, 576 F.2d 765, 769 (8th Cir. 1978). Since *Bazemore*, courts have recognized as a valid claim for relief the allegation that an employer has failed to remedy the continuing effects of pre-act salary discrimination. *See Trout v. Lehman*, 652 F.Supp. 144, 146 (D.D.C. 1986); *cf. Rodriguez v. Chandler*, 641 F.Supp. 1292, 1298 n.18 (S.D.N.Y. 1986).

The *Bazemore* Court also addressed a key evidentiary issue: the weight to be accorded a multiple regression analysis which purports to show discrimination, but which the defendant argues fails to account for certain relevant variables. The Court held that the "failure to include variables will affect the analysis' probativeness, not its admissibility." *Id.* 106 S.Ct. at 3009 (footnote omitted).

In the new light case by *Bazemore*, we remanded this case to the district court to afford it an opportunity to determine in the first instance what effect it might have. *Sobel II*, 797 F.2d 1478. On remand, however, the district court made no attempt to assess the full impact of *Bazemore* on plaintiffs' claims and evidence. Instead, the court adhered to its earlier judgment on the technical basis that even if *Bazemore* altered the law on the substantive issues, its ruling that plaintiffs had failed to raise their "disparate impact" theory until it was unfair to Yeshiva, provided a sufficient independent basis to uphold the judgment dismissing the complaint. *Sobel III*, 656 F.Supp. at 590-91. This second appeal followed.

DISCUSSION

I. *The "Procedural Bar" to Plaintiffs' Disparate Impact Claim.*

We first address the district court's holding that plaintiffs were precluded from raising a disparate impact claim against Yeshiva because of their failure to raise the claim "until the last minute", *Sobel III*, 656 F.Supp. at 590, that is, "midway through the trial." *Sobel I*, 566 F.Supp. at 1186. While we recognize that the district court is vastly more familiar than are we with the details of the seven years of pre-trial proceedings in this case, we are, frankly, somewhat perplexed by this finding of a "procedural bar". In our view, the essence of plaintiffs' case was well known to Yeshiva throughout—and in fact long before—the trial, and it consisted of precisely the claim the district court found not to have been raised until midway through trial. Moreover, the distinction between "disparate treatment" and "disparate impact" cases drawn by the district court artificially and unrealistically pigeon-holed plaintiffs' claim. Finally, even were

we to agree that there was some distinct disparate impact claim that was not raised by plaintiffs until midway through trial, the district court on remand should not have precluded the claim because of the change in the law wrought by *Bazemore*. We address these points in turn.

A. *The Timeliness of Plaintiffs' Claim.*

While it is true that a litigant may be barred from raising a claim if it would work an unfair surprise on her adversary, *see Ste. Marie*, 650 F.2d at 399 n.2 (attempt on appeal to argue that evidence supported disparate impact theory not argued at trial rejected as "belated"); *Presseisen v. Swarthmore College*, 442 F.Supp. 593, 603 (E.D.Pa. 1977), *aff'd without op.*, 582 F.2d 1275 (3d Cir. 1978); *cf. Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604-05 (2d Cir. 1986)(where plaintiff raised only disparate treatment argument at trial, "it would have been unfair to evaluate the evidence under the disparate impact theory after trial"), the critical question is whether the claim was in fact not raised until it was too late. We need not consider here whether the point indicated by the district court when plaintiffs allegedly first raised the disparate impact claim ("midway through the trial") would have been too late, since the record contradicts the district court's view and shows the claim was raised well in advance of trial.

The district court, and to some degree the parties, became caught up in the labels applied to claims, as opposed to the actual nature of them. Sobel argues on appeal that the single mention of the magic phrase "disparate impact" in the EEOC's pretrial memorandum was sufficient to raise the claim. This argument misses the point; what is important is whether the defendant was reasonably aware of the claim, not whether plaintiffs at some time in the pre-trial period happened to use the right phrase. *See Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980)(question is whether the time at which defendants were made aware of the thrust of plaintiff's case "will unfairly prejudice the defendants in their defense"); *see also* 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1219 at 145-46 (1969 & 1987 Supp.).

Having examined the trial transcript and reviewed the pre-trial documents in the record on appeal, we are convinced that Yeshiva was fully cognizant that plaintiffs' claim consisted of the central allegation that the system of guideline salary increases left the plaintiff class perpetually behind their male counterparts on the AECOM faculty. The trial brief jointly submitted by plaintiffs and the EEOC contained the following argument:

> While it may not have been unlawful for AECOM to discriminate against women prior to 1972, such conduct did become unlawful after March 24, 1972. AECOM officials had broad discretion to set and adjust salaries, including discretion to correct salary inequities and *** [t]his discretion provided a ready mechanism for remedying salary in equities based on sex. Accordingly, each time AECOM paid a faculty member after 1972, by regularly issued pay checks *** it reasserted its prior discriminatory salary determinations.
>
> * * * * * *
>
> Assume an employer in 1963 hired white vice-presidents at a salary of $10,000 per year and black vice-presidents at $8,000 per year. *** In 1965, when private employers became subject to the provisions of Title VII, this hypothetical employer would have had a clear obligation under law to equalize the salaries of the white and black vice-presidents. If the employer merely awarded *** raises on a nondiscriminatory basis, the prior racial classifications would not only continue, but indeed be created anew with each paycheck.

Plaintiffs' Trial Br. at 14-15. This argument was not lost on Yeshiva, for it went to some lengths to respond. For example, Point III of Yeshiva's trial brief was addressed to what Yeshiva saw as a fatal flaw in plaintiffs' regression: that it failed to separate out the effects of pre-act salary disparities, which were not illegal and, in Yeshiva's view, could not support a finding of a present violation. As Yeshiva argued,

> Plaintiffs in this case stand in no better position than the unsuccessful plaintiff in *Farris v. Board of Education*, 576 F.2d 765 (8th Cir. 1978). In that case, the Court dismissed plaintiff's claim that her salary was comparatively low because annual raises were based on each previous year's salary and her prior salary had been reduced when she took an unpaid maternity leave. While that past act might have constituted discrimination had it not occurred before the passage of Title VII, the defendants' current policy of granting raises based on each previous year's salary was a neutral one and, therefore, her claim was defeated.

Defendant's Trial Brief at 49. Yeshiva went on to argue, "Plaintiffs [sic] yearly salary regressions of faculty hired both before and after the statute of limitations are only probative if AECOM was legally obligated to remedy time-barred discrimination***." *Id.* at 50. After *Bazemore*, however, the point is not whether Yeshiva had to remedy time-barred discrimination (which would be pre-1974), but rather whether it had to remedy discrimination in the limitations period but which originated prior to the application of Title VII to universities in 1972. Nevertheless, it is clear that in its trial brief Yeshiva regarded at least one of the plaintiffs' claims as resting on an obligation to equalize salaries once Title VII applied to universities—the very claim the district court found to have been suddenly sprung on Yeshiva midway through the trial.

If these excerpts did not establish Yeshiva's awareness of this aspect of plaintiffs' case, the summation of its position in the pretrial brief surely did: "[T]he focus is not on the 'bottom line', which in this case would be the alleged salary disparities, but rather on the present employment practices and policies, such as the setting of starting salaries and annual increases, during the relevant time period." *Id.* at 51. We conclude that defense counsel was here responding to the claim he perceived plaintiffs to be raising at that time—prior to trial.

Our reading of the trial transcript bolsters our conclusion that plaintiffs were from the outset raising the claim that the

guideline system operated to maintain women's salaries at a discriminatorily low level that had been set, for the most part, prior to 1972. Early in the trial, during the testimony of Dr. Ephraim Friedman, only the third witness, the district judge made the following statement of Sobel's case:

> THE COURT: The position you are arguing for is that since they give salary increases yearly, albeit on a sort of guideline, across-the-board basis, that as of the first year the act becomes effective they were required to correct all pre-act inequities and to immediately bring all females to the salary level that they would have been at if they had not been discriminated against, perhaps for many years before the act***

Trial Tr. at 383. At least at that early stage of the trial, if not before, the district judge understood plaintiffs to be raising the argument that guideline increases, given presumably equally to both men and women, would not meet Yeshiva's obligation to eradicate continuing effects of pre-1972 discrimination. Indeed, he told plaintiffs that "you may correctly assume that I have not bought your argument *in your trial memo* that *Evans* notwithstanding, failure each year to correct pre-act discrimination constitutes an offense under the act." *Id.* at 382 (emphasis added). To be sure, the court did not accept the argument; nevertheless, plaintiffs did raise it.

In fact, this understanding of plaintiffs' central argument pervaded the trial. The trial court repeatedly expressed skepticism over the validity of plaintiffs' regressions because they did not separate out the effect of salaries that, even if discriminatory, were established before 1972 and were not, in the district court's view of pre-*Bazemore* law, required to be increased. For example, the court engaged in this exchange with one of plaintiffs' expert witnesses, Dr. Donald Wise, and plaintiffs' counsel, Michael Buchwach:

> THE COURT: If *** you are attempting to establish whether there are gender based discriminations only in years after a certain date and if some of the people were hired before

that date so that you might commence with a gender based discrimination that carries over, does a pure linear regression establish that?

THE WITNESS: I think it could.***

THE COURT: [F]or those who were hired before the effective date of Title 7, would not a better approach for determining discrimination in the years that the law was in effect have been not to use total salary, but to use year-by-year changes in increment as the basis of your comparison?

* * * * * *

[T]he plaintiffs' approach is that after the act became effective, men and women should have been given the same raises, other things being equal, on a gross basis, in other words, you shouldn't take into account the fact that somebody has been discriminated against before and use that as a basis for giving a smaller gross raise even if it is percentage-wise the same.

MR. BUCHWACH: Your Honor, I don't think you are accurately stating the plaintiffs' theory.

THE COURT: What is your theory?

MR. BUCHWACH: Plaintiffs' theory is that people with the same background, experience and the other variables taken into account should be paid the same sums of money.

THE COURT: You go even further. You say that the first year the act went into effect and a 10 percent guideline raise was given to the man, taking him to $22,000, the woman should have been given a $12,000 raise from her $10,000 salary and paid $22,000 that year. *I know you take that position.*

MR. BUCHWACH: Yes, your Honor.

THE COURT: I don't think there is any possible support for it, but you can make an intermediate argument that even under *Evans*, while they weren't compelled to bring her salary up to what it would otherwise have been, it would be inappropriate to use percentage raises that keep

> perpetuating the past discrepancy and that she was entitled to a $2,000 raise the first year and not a $1,000 raise the first year.

Trial Tr. at 712-16 (emphasis added). It is evident from this exchange that the court was well aware that plaintiffs' central premise was that unless women's salaries were immediately brought up to those of the men on the faculty, the guideline increases women would thereafter receive would never allow them to achieve salary parity. *See also* Trial Tr. at 979-81 (district court indicating that the "interesting comparison" was between pre-act salaries and post-act salaries, and perhaps that "to the extent there has been sex discrimination there has been an effort to eliminate it over the years that has at least been effective with the more recently employed persons"); at 1249 (district court questions witness based on premise that "since [women] had previously been discriminated against and since they were being given guideline raises thereafter, their salaries tended to keep dragging behind" those of men); at 1278 (district court hypothetically accepts "defendant's position that [the law] does not require immediate changes in [the salary of] every woman who had been discriminated against pre-Act", and characterizing as a "fall-back position" plaintiffs' argument that even if immediate equalization is not required, constant percentage increases merely perpetuate past discrimination).

What appears to have occurred at trial is that the court early in the trial rejected plaintiffs' legal argument that Yeshiva had a legal obligation to equalize women's salaries immediately upon application of Title VII to universities, and concluded that so long as women fell no further behind in the post-act period, that was sufficient compliance on the part of Yeshiva. His concern appears to have been that if a male faculty member making $20,000 and a female faculty member making $10,000 both received a 10% raise, in real terms, the male would receive a $2,000 increase, while the woman would receive only $1,000 more in salary, thus not only perpetuating the pre-act disparities, but at least in absolute terms, widening them. *Bazemore*, of course, reveals that the trial judge's initial determination was

incorrect; the point here, however, is simply that in reaching that conclusion and focusing as he did on the more narrow question of percentage-v.-absolute salary increases, the district court was in fact dealing with the very issue that it later held had not even been raised until midway through trial.

Our impression is further supported by the district court's evidentiary rulings, which often turned on its perception of the limited relevance of evidence of pre-act salary discrimination. For example, plaintiffs sought to introduce a letter written by Dr. Sam Seifter, while he was chairperson of the biochemistry department, to Dr. Friedman, the dean of AECOM, in 1975, requesting an out-of-guideline increase for a female member of his department, Dr. Blumenfeld. As characterized by defendant's counsel, the letter "reflect[ed] what some chairman [said] *** Dr. Blumenfeld has been paid lower salaries because of some historical trends." Trial Tr. at 365. Plaintiffs wanted the letter introduced to show the dean's awareness of complaints of salary inequities due to gender; as counsel argued, "I think that's exactly what Dr. Seifter was complaining about because it says in *** Dr. Seifter's letter: Her relatively low salary is in my judgment related to lower salaries accorded to women *and which have been perpetuated despite regular increments.*" *Id.* at 369 (emphasis added).

The district court reserved ruling on the Seifter letter at that point, but later stated (based on the fact that Dr. Blumenfeld apparently received the requested out-of-guideline increase),

> I would point out to you that depending on the view one takes of evidence in other cases, it is conceivable that this is evidence in support of the defense, namely, that there was historical discrimination against women, that it ceased on the day Title 7 became effective to Yeshiva, and that *apparent statistical discrepancies are carryovers which under Evans you are not required to remedy.*

Trial Tr. at 633 (emphasis added). At other points in the trial, the district court indicated that inequities that may have existed

prior to 1974, the pre-limitations period, could be shown only to demonstrate "background", and that such evidence was not directly relevant as to the remedial period. As we discuss more fully below, these rulings were erroneous in light of *Bazemore*, but, erroneous or not, they demonstrate that the thinking of the district court plainly was focused on the idea of isolating pre-act discrimination. That the district court was aware of the nature of Sobel's "disparate impact" theory is further made plain by its statement to plaintiffs' expert, Dr. Ashenfelter:

> [O]ne [possible conclusion] is that a substantial part of what you detect—what you have determined to be sex discrimination is directed at those women employed before March 24, 1972, and to that extent it brings into focus some of the different legal theories we have discussed concerning carryover effects, corrections of them, and what-have-you ***

Trial Tr. at 980-81. Thus, it is evident that plaintiffs' "disparate impact" claim, in substance, was before the district court before trial, and was a major focus of the court's thinking during trial.

B. *The Legal Characterization of Sobel's Claim.*

The district court's finding that Sobel's disparate impact claim was not timely raised depended, of course, on its ruling that what it perceived her to be arguing was, in fact, a disparate impact claim. We disagree. This was a mischaracterization of the nature of Sobel's *Bazemore*-style allegation and erroneously focused on salary increases under the guideline system rather than on the initial failure, when Title VII was first applied to universities, to raise women's salaries to the same levels enjoyed by comparably situated men.

As we have already discussed, Sobel's claim that Yeshiva's guideline system of salary increases perpetuated (and, to some degree, exacerbated) pre-act salary discrimination was before the district court prior to and throughout the trial. This claim is on all fours with the claim recognized by the Supreme Court in *Bazemore*. *See* 106 S.Ct. at 3004-06. *Bazemore* involved an allegation of discrimination on the basis of race in salaries in

the North Carolina Agricultural Extension Service. The plaintiffs alleged that initial salaries paid to black employees were lower than those paid to whites, and that such discrimination was perpetuated by the defendant's system of increasing salaries, which in some ways was remarkably similar to Yeshiva's guideline system. *See Bazemore v. Friday*, 751 F.2d 662, 668, 671 (4th Cir. 1984)(portion of salary increases based on across-the-board and percentage increases given nondiscriminatorily; remainder based on subjective merit a potential source of discrimination). The plaintiffs argued "that the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not." *Id.* at 670. That was precisely plaintiffs' claim here.

Such a claim is not properly characterized solely as one of disparate impact. A classic disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or a height requirement, for its differential impact on the hiring or salary of a particular group. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 446, 102 S.Ct. 2525, 2530, 73 L.Ed.2d 130 (1982); *Dothard*, 433 U.S. at 329, 97 S.Ct. at 2726; *Clady v. County of Los Angeles*, 770 F.2d 1421, 1427 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109, 106 S.Ct. 1516, 89 L.Ed.2d 915 (1986). Never directly questioned in a disparate impact case—probably because it is not an essential element of a plaintiff's *prima facie* case—is *why* the practice in question disproportionately affects the group. If the issue arises, it does so in the context of the employer's burden, in light of the plaintiff's *prima facie* showing, to show that "any given requirement [having a disparate impact] must have a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). If, for example, a test of physical skills such as speed, strength, and stamina disproportionately disqualifies women from employment as firefighters, the employer would attempt to demonstrate that the reason women were failing the test more often than men was because they lack those attributes, and then that such qualities were job-related. *See Berkman v. City of New York*, 812 F.2d 52, 59-60 (2d Cir.), *cert. denied*,—U.S.—, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987).

In this case, the reason why the facially neutral guideline system had a "disproportionate" impact on women – indeed, the only reason such a system of across-the-board salary increases could ever have a disparate impact – was because of pre-act discrimination, either in setting initial salaries or, at some point, in increasing them discriminatorily. The disparity in impact of the facially neutral guideline policy resulted from earlier disparate treatment, both pre-act and pre-statute of limitations. The neutral mechanism, far from being the discriminatory act, is merely the means by which the pre-act and pre-limitations disparate treatment is carried forward into the actionable time frame.

Here, the adherence by Yeshiva to the guideline system was not the violation claimed by Sobel; she, like the *Bazemore* plaintiffs, was challenging the failure to equalize salaries, separate and apart from the operation of the guideline system. *See Sobel I*, 566 F.Supp. at 1186 n.54 ("[I]f [plaintiffs] were simply granted a one-time adjustment to make the average of their salaries equal to that of their male counterparts, they would be perfectly content to let the guideline system continue operating just as it has for years."). Of course, the two are in practice two sides of the same coin; adherence to the guideline system effectively precluded giving the one-time increases that would have equalized women's salaries.

While it is true that in a disparate treatment case a plaintiff ordinarily must show discriminatory motive, a showing unnecessary in a disparate impact case, *see Dothard*, 433 U.S. at 329, 97 S.Ct. at 2726; *Williams v. Colorado Springs, Colo. Sch. Dist.*, 641 F.2d 835, 839 (10th Cir. 1981), this distinction is not relevant to a *Bazemore* claim. While Sobel probably could not show that Yeshiva's adherence to the guideline system was done with discriminatory motive, that adherence was, as we have noted, only the manner in which the disparities were perpetuated; the violation was Yeshiva's failure to remedy the disparities. The failure to bring women's salaries up to par with those of men the day Title VII applied to Yeshiva is the sort of pattern and practice that would sustain a disparate treatment claim, even absent explicit proof of discriminatory motive. *See*

International B'Hood of Teamsters v. United States, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977).

C. *The Treatment of Plaintiffs' Claim After Bazemore.*

Even if we were to agree that the district court was initially correct in treating as procedurally barred plaintiffs' claim of perpetuation of salary disparities, we would nevertheless conclude that in light of *Bazemore* it was error to continue to do so on our remand to the district court.

It is beyond question that a pending case must be decided under the law in effect at the time it is decided, as opposed to that governing when the case was tried, if the law changes in the interim. *Thorpe v. Housing Authority*, 393 U.S. 268, 281-82, 89 S.Ct. 518, 525-26, 21 L.Ed.2d 474 (1969)("The general rule *** is that an appellate court must apply the law in effect at the time it renders its decision. *** This same reasoning has been applied where the change was constitutional, statutory, or judicial." (footnotes omitted)); *Spirt v. Teachers Ins. and Annuity Ass'n*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881, 105 S.Ct. 247, 83 L.Ed.2d 185 (1984); *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 960 & n.11 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072, 99 S.Ct. 844, 59 L.Ed.2d 38 (1979).

In light of *Bazemore*, various of the district court's rulings became erroneous. The most obvious error (with hindsight) was that the court discounted the weight to be accorded plaintiffs' regression studies in part because plaintiffs had not eliminated the effects of pre-act salary discrimination. While this was not the only basis on which the trial judge rejected plaintiffs' experts' conclusions, it is clear from his opinion, as well as from as his intense questioning of plaintiffs' experts on this very issue, that this was a critical element in his mind.

Perhaps as important, the district court's concentration on the discrmination that directly could be traced to the post-act period prevented it from focusing on that portion of the data that was the strongest part of plaintiffs' proof – the salary disparities among pre-1972 hires. Indeed, the court *discounted*

the strength of plaintiffs' data for the entire class because it *included* pre-1972 hires, whose lower salaries the court felt resulted from pre-1972, and therefore not actionable, salary decisions.

Moreover, the court's treatment of much of plaintiffs' anecdotal evidence of discrimination by Yeshiva was affected by its secondary focus on acts occurring before 1972. The court criticized plaintiffs for the paucity of anecdotal evidence, 566 F.Supp. at 1184-86, but most of what they tried to introduce related to pre-act events, and the district court either refused to admit it at all, Trial Tr. at 382 (were court to accept plaintiffs' "continuing effects" theory, "there would be a good deal more admissibility" to rejected letter written by department chairperson in 1976 indicating past gender inequities had not been resolved), or allowed it in only as "background", Trial Tr. at 251-59 (accepting only for limited purposes document relating to recommendations for out-of-guideline increases, allegedly to correct sex disparities, made prior to limitations period). In *Sobel I*, the court said that anecdotal evidence dating from before December 1974, the limitations date, was "entitled to little weight and constitute[d] only relevant background evidence." 566 F.Supp. at 1185. So limiting the presentation of plaintiffs' case might well have been appropriate before the Supreme Court decided *Bazemore*, *see Bazemore*, 751 F.2d at 672 ("pre-Act discrimination" admissible "to show the general background of the case, or intent, or to support an inference that such discrimination continued"), but the Supreme Court's reversal of the fourth circuit in *Bazemore* makes such evidence directly probative as supporting the claim that the disparities evidenced in the post-1972 salaries of pre-1972 hires were due to discrimination against them.

In short, despite the length of the trial, of the record, of the exhibit list, and of the district court's opinion, plaintiffs have not received a full and fair opportunity to have their case heard in light of the new learning contributed by *Bazemore*. The unusual nature of the *Bazemore* claim makes it appropriate to allow plaintiffs even now an opportunity to construct a "continuing effects" claim, even if Sobel had not attempted to do so in the first trial. Since she did in fact try to make out such

a case, and since defendant was well aware of what it was that plaintiffs were seeking to do, there is no imaginable unfairness to Yeshiva in allowing plaintiffs to establish what they tried to establish at the first trial, and might well have been able to establish but for the rulings of the district court made erroneous by *Bazemore*.

It would not have been surprising if plaintiffs had failed to focus on the theory that pre-1972 disparities in salary were carried over into the post-act (and, later, into the limitations) period, since the district court, and the weight of authority, indicated that the continuing effects theory was closed to plaintiffs by *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885. Perhaps these plaintiffs may be considered fortunate that *Bazemore* came down just in time for it to be applied to their case, but good fortune is sometimes a litigant's best ally.

We expected with our earlier remand in this case that the district court would reopen the case for the admission of additional evidence, including some that originally was excluded, and for reevaluation of the entire record as supplemented in order to consider the related questions of whether there was pre-act discrimination and whether it was, in fact, carried over into the actionable period. *Bazemore* gave plaintiffs the right to such an inquiry, a right denied to them by the district court's cursory treatment of the case on remand.

II. *Alternative Bases for the District Court's Decision.*

The district court appears to have offered at least two other grounds for dismissal of plaintiffs' complaint. First, it distinguished *Bazemore* on the ground that it involved discrimination against blacks, while here the plaintiff class is composed of women. Second, in its initial decision, the court held that plaintiffs had not established their "disparate impact" claim. Neither factor is sufficient to avoid a full reevaluation of the case under *Bazemore*.

A. *The Applicability of Bazemore to Gender Discrimination.*

In its opinion on remand, the district court drew a distinction between race and gender discrimination, on the ground that

racial discrimination was illegal even before Title VII, while gender discrimination claims are "solely a product of Title VII, and claims in that regard did not exist for pre-Act periods." *Sobel III*, 656 F.Supp. at 589 n.5. He implied from this that employers ought not be held liable for the consequences of pre-act discrimination not illegal when made.

We need not tarry long on this erroneous conclusion, since it rests on a misunderstanding of *Bazemore*. The Supreme Court did not allow an employer to be held liable for its pre-act decisions; indeed, *Bazemore* specifically stated that there is no back-pay liability for the discriminatory paychecks received by blacks before Title VII became effective to the North Carolina Agricultural Extension Service. *Bazemore*, 106 S.Ct. at 3006.

What the employer is liable for is continuing its pre-act discrimination into the post-act period. It violates Title VII to pay lesser salaries to protected employees during the time the statute applies to the employer, and in determining whether such a violation occurred, the prior character of the pre-act discrimination – whether it was illegal apart from Title VII – is irrelevant. *Bazemore* held that the treatment of blacks *after* Title VII was applied to their employer can constitute a Title VII violation, even if the conduct began before the effective date. There is no reason that logic should not apply with equal force to gender discrimination. *Cf. City of Los Angeles v. Manhart*, 435 U.S. 702, 709, 98 S.Ct. 1370, 1375, 55 L.Ed.2d 657 (1978) (equating claims of racial and gender discrimination).

B. *The Viability of Plaintiffs' "Continuing Effects" Claim.*

In *Sobel I*, the district court offered alternative reasons for rejecting plaintiffs' "disparate impact" theory. We have already addressed the first, the alleged procedural bar arising from the timing of plaintiffs' assertion of the claim. The second was that plaintiffs had been unsuccessful in proving the claim. As the district judge himself intimated in *Sobel III*, this conclusion cannot stand in the face of *Bazemore*.

It appears to us that even as the record stands now, without the supplementation we had expected would occur on the

remand, there is considerable evidence to support a *Bazemore*-type violation. Table 3 of the district court's first opinion, 566 F.Supp. at 1177, demonstrates that when only plaintiffs' variables are used in a regression analysis, and using the data agreed upon by the parties, the analysis produces a statistically significant sex coefficient among pre-1972 hires for every year from 1974 to 1979, whether the computation is done on salary or a logarithm of salary, except 1976, where the coefficient for salary is 1.98, just under the 2.0 level of statistical significance. Table 4 shows that even when some of defendants' suggested variables are included, the statistical significance is maintained for 1977-1979 when plaintiffs' data is used, and for 1976 and 1977 when the agreed-upon data is used.

The district court plainly found this data important in its decision, since it discussed at length as a weakness in plaintiffs' case the fact that they did not "analyze the extent to which salary differentials may have been the consequence of discriminatory acts that occurred prior to the date that Title VII became applicable to universities", *id.* at 1182, and made much of the statement by plaintiffs' expert, Dr. Ashenfelter, that, when that analysis was later performed, it "revealed no statistically significant proof of sexual discrimination during the relevant time period." *Id.*

We are frankly skeptical of defendant's claim now that there was no discrimination even before Title VII was applied to Yeshiva. The district court discounted plaintiffs' showing of salary disparities in the actionable period because it felt whatever disparities had been shown were due to pre-act events. If that was true when Yeshiva stood to benefit because *Evans* and its progeny appeared to insulate it from liability for those pre-act events, it is no less true now that that view of *Evans* has been discredited by *Bazemore*. Fact-finding is not a function of which side will benefit depending upon how the relevant law may treat a given fact.

While it is true that Yeshiva has always maintained that there is no evidence even of pre-act discrimination, and has relied only as a secondary position on the idea that if there was

discrimination it must have been pre-1972, the district court appears to have accepted that secondary position as at least part of the true explanation for the current (i.e., 1974-1979) disparities. The district court's comments during trial reflect this, *see, e.g.*, Trial Tr. at 980-81 ("From [the increases in women's relative pay] two possible conclusions can be drawn, and one is that a substantial part of what you detect – what you have determined to be sex discrimination is directed at those women employed before March 24, 1972 ***."), and its opinion confirms it. *See Sobel I*, 566 F.Supp. at 1188 ("The original salaries of those hired before March 24, 1972, did not have to meet the standards established under Title VII. *** Hence, the plaintiffs are placed in the awkward position of arguing that past initial salaries which were allegedly discriminatory but certainly legal, and present annual increases that have been shown to be fair and non-discriminatory somehow add up to a 'present violation' of Title VII."). While the district court was appropriately cautious about making an unnecessary (given its view of the pre-*Bazemore* law) determination of whether plaintiffs' allegations of pre-act salary discrimination had been proven, such a determination is now rendered necessary by *Bazemore*.

Our conclusion that plaintiffs' allegation of pre-act salary discrimination being carried over into post-act salary disparities must be considered anew is buttressed by the district court's opinion on remand. The district court stated, "Had we relied solely on *Evans* in dismissing the plaintiffs' disparate impact claim on the merits, our prior ruling might require reconsideration." *Sobel III*, 656 F.Supp. at 590. Since we have already rejected the alternative ground (the procedural bar) upon which the district court's dismissal rested, we agree that the prior ruling "require[s] reconsideration." This is true even though the trial judge indicated in his opinion that "the evidence showed that [lower salaries initially paid to some female faculty members hired prior to 1972] probably resulted not from discrimination, but from several gender-neutral factors." *Id.* at 589.

Such so-called "gender-neutral factors" pointed to by the district court are, however, little more than inferences, built on speculation and stereotypes, unsupported by the record. In a

footnote from *Sobel I* – repeated in *Sobel III* – the district court found that much of the pre-act disparity was due to the "accepted sociological fact that [in the 1960s] the percentage of men who were the sole wage earners for families with children exceeded the percentage of married women who were such." *Sobel I*, 566 F.Supp. at 1184 n.49. According to the court, it "was considered not only socially acceptable but also socially desirable" to favor sole heads of households. *Sobel III*, 656 F.Supp. at 590 n.8.

The problems with this approach to fact-finding are many. First, Yeshiva introduced no evidence – none – either that such a policy was in effect at AECOM, even informally, or that the "accepted sociological fact" that men were more often sole wage earners was true on the AECOM faculty. There was some testimony that, with AECOM in some financial difficulty in the late 1960s, salary increases tended to go to those who complained loudest and longest. Trial Tr. at 1251-52. It was the court, however, that inferred from that that sole wage earners were more likely to complain and therefore to get the raises, and then inferred further that this was likely to favor men because the "accepted sociological fact" was true at AECOM, and finally that this difference explained the pre-1972 salary disparities. We find this chain of inferences too weak to support a valid conclusion.

Equally important, there is no evidence in the record indicating how such a "policy" – if it existed – was implemented, and whether it was "gender-neutral". For example, assuming that some women on the AECOM faculty were sole wage earners, did Yeshiva pay them more than their female colleagues not so situated? Were there demonstrable differences between male faculty members based on their status as the head of a household? If such a "gender-neutral" policy existed, and if it had a disproportionate effect on women, Yeshiva presumably would have to show that this policy was job-related, a showing we doubt it could make. In short, the supposedly "gender-neutral" factor found by the district court rested on a stereotyped notion of male and female characteristics (in this instance, "sociological" characteristics) the application of which to this

case simply had no basis in the record, and which almost certainly violated Title VII if it continued to affect women after Title VII was applied to Yeshiva. *Cf. Manhart*, 435 U.S. at 707, 98 S.Ct. at 1375 ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions *** are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.").

In short, the district court's explanations for disregarding pre-act salary disparities simply are not supported by the evidence, which to this point is incomplete on the crucial question of pre-1972 salaries at Yeshiva. We need not speculate, as the district court did, *see Sobel III*, 656 F.Supp. at 590-91 n. 10 ("In view of the evidence presented, we question whether such a case could ever have been successful."), as to the likelihood of plaintiffs' succeeding in a new trial. They are entitled to try.

III. *Matters For Administration on Remand.*

As we have indicated, we are concerned about the long history this case has thus far written. In the hope that we can facilitate the closing of this chapter in the lives of these litigants, of the southern district, and of this court, we offer the following suggestions for the remand.

A. *The Weight to be Accorded Plaintiffs' Regressions.*

Part of our initial remand in this case was for the purpose of reconsidering the probative value of plaintiffs' regression analyses in light of *Bazemore*. *See Sobel II*, 797 F.2d at 1479. While we agree with the district court's determination in *Sobel III* that it was correct in *Sobel I* insofar as it treated the flaws in plaintiffs' regressions as going to the weight rather than their admissibility, *see Bazemore*, 106 S.Ct. at 3009, the court did not, in *Sobel I*, apply the correct standard in evaluating defendant's objections to the regressions.

We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that

the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis. *See Bazemore*, 106 S.Ct. at 3010-11 n.14 ("[Defendants'] strategy at trial was to declare simply that many factors go into making up an individual employee's salary; they made no attempt *** to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites."); *see also Palmer v. Schultz*, 815 F.2d 84, 101 (D.D.Cir. 1987) ("Implicit in the *Bazemore* holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities *** generally cannot defeat the inference of discrimination created by plaintiffs' statistics.").

Here, one of Yeshiva's primary attacks on plaintiffs' proof was "the plaintiffs' use of inadequate proxies for productivity." *Sobel I*, 566 F.Supp. at 1182. Yeshiva contended that Sobel had left out several important variables that would represent productivity and, implicitly, reduce the sex coefficient by explaining some of the disparity in salary which plaintiffs' experts had attributed to gender discrimination.

With one exception – rank – which will be discussed shortly, Yeshiva did not show that, with these factors accounted for, the apparent gender disparity was reduced. Yeshiva's experts simply criticized plaintiffs' failure to include them, offering no reason, in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient. Of course, Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable, but such an attack should be specific and make a showing of relevance for each particular variable it contends plaintiffs ought to include. Ideally, Yeshiva would seek to do so by offering its own regression that includes the variable it contends improperly was omitted. At the first trial, the single regression Yeshiva offered was packed with all of the factors it contended plaintiffs should have included, but it provided the court with no chance to sift through the various factors to determine the weight to be assigned to any of them.

As contained in Yeshiva's experts' report, the failure by plaintiffs' adequately to reflect productivity caused an "underadjustment bias" whereby the disparities based on productivity were understated, and the disparities attributed to gender were correspondingly overstated. The report stated:

> *[I]t is a mathematical fact that if in a multiple regression analysis salary is regressed on proxies that imperfectly reflect qualifications and productivity, and if women generally have lower proxy values than men, then there will be an underadjustment for differences in true productivity and a resulting overstatement of the sex coefficient* ***

Defendant's Statistical Report, Trial Ex. 745, at 69-70 (emphasis in original). The key to this argument, of course, is that "women generally have lower proxy values than men". If women and men have equal measures of true productivity, then having imperfect variables for productivity would cause no underadjustment.

Bazemore, as applied here, requires Yeshiva to show that the failure to include a proxy causes an actual underadjustment. Yeshiva's experts concluded that Sobel's regressions contained an "underadjustment bias" simply because men scored higher on the included variables. *See id.* at 74 n.*. Insofar as Yeshiva argued that simply because men "scored" higher the imperfection of the included variables itself proved that the regression underadjusted for productivity, the argument is unpersuasive. Men might have scored even higher had the variables perfectly reflected productivity, and this would have explained even more of the apparent gender disparity. But it is equally possible that the imperfection had the opposite effect; that *women* would have scored higher if the proxies were more accurate. On the present record, there is no way to tell which gender was disadvantaged by the imperfections.

Put another way, all that is known about the proxies used by plaintiffs in their regression is that they are not perfect measures of productivity, and that insofar as they do measure productivity they show that men on the AECOM faculty possess

the attributes tied to productivity (e.g., experience) in greater measure. What is not known is whether variables that exactly measured productivity would show the same advantage for men (and thus would explain the same portion of the raw gender disparity as the imperfect proxies), a lesser advantage for men (and therefore explain less of the gender discrepancy), or a larger advantage. In short, the simple fact of imperfection, without more, does not establish that plaintiffs' model suffers from underadjustment, even though men score higher on the proxies.

If the argument is instead that the excluded variables are likely to favor men simply because the included ones do so, and that therefore failing to include them is what causes underadjustment, Yeshiva still must show that the former ought to have been included on a stronger basis than simply that they favor men; they must still be actual determinants of salary, or at least adequate proxies for productivity. Moreover, they must be shown not to be multicollinear with those variables already included, and for that matter with each other, and also not themselves tainted by sex discrimination. In short, if Yeshiva seeks to show that plaintiff's regression analysis suffers from failure appropriately to adjust raw salary disparities for differences in productivity, it must actually demonstrate that failure. It cannot rely on assumptions about imperfections inherent in productivity proxies, nor can it simply propose alternative variables without justifying their inclusion.

As to rank, we conclude that it was appropriately included by the district court. Plaintiffs concede that rank does correlate with sex, and concede further that rank does at least loosely reflect productivity. They argue only that its inclusion may serve to mask sex discrimination because promotions in rank might not have been gender-neutral. However, the district court concluded that "promotions in rank *** were in fact based on merit and were not contaminated by elements of sexual discrimination", *Sobel I*, 566 F.Supp. at 1180, and in light of the fact that plaintiffs abandoned before trial any claim of gender discrimination in promotions, that finding is not clearly erroneous. Thus, on remand, rank should be included as a variable in any regression analysis.

We also reject Yeshiva's attack on the multiple regression technique as a general matter when applied to the complex and diverse context of a medical school faculty. While it is true that the relative uniqueness of each faculty member, and the subjectivity of many of the determinants of salary, make a regression analysis difficult, these problems are not insurmountable. Indeed, as a device designed to sift through various factors in order to assess as accurately as possible the influence of any one of them, the multiple regression analysis is the accepted means for performing this difficult task. *See Bazemore*, 106 S.Ct. at 3008-09 (accepting plaintiffs' case which "relied heavily on multiple regression analyses" and saying that a "plaintiff in a Title VII suit need not prove discrimination with scientific certainty"). Accepting Yeshiva's contention would have the practical effect of insulating universities from charges of discrimination in the setting of faculty salaries, since such claims may well be virtually unprovable by any other means.

In the place of multiple regressions, Yeshiva sought to introduce the so-called "urn model", an analytic tool remarkable only for its extremely limited usefulness. In an effort to show that the salary disparity identified by plaintiffs as being due to gender could in fact occur at random, Yeshiva's experts conducted the following procedure: slips containing the salaries of all AECOM faculty members were placed in an "urn", and a number equaling the number of women on the faculty was drawn at random. This, in effect, formed a "control" group that could be compared to the female faculty members, since the random selection was by definition nondiscriminatory. If the average salary of the "control" group, when compared to the salary slips left in the urn, approximated the disparity that existed between women and men, it would tend to show that that disparity could have occurred at random.

The advantage to this approach is its simplicity, since "its use did not depend on the same underlying assumptions upon which the plaintiffs' model rested, and which were so much in doubt." *Sobel I*, 566 F.Supp. at 1183 n.42. Because of this, the court found that "the urn model provided a very appropriate test given

Einstein's complex organization and the diffuse factors affecting salaries." *Id.*

All the urn model tends to show, however, is that a given salary disparity *could* occur at random. It does not show that this disparity *did* occur at random. It is implicit in the concept of a multiple regression that the importance it attributes to a variable, such as gender, is susceptible to varying degrees of certainty; except in the most extreme cases, there is always the possibility that any difference attributed to a given factor will actually be the result of chance. The chance that random selection will produce the same disparity is reflected in the statistical significance of the disparity – the greater the disparity, the less the chance it occurred at random, and the greater the statistical significance of the sex coefficient.

Thus, the value of the urn model is limited to graphically illustrating the uncertainty inherent in any multiple regression analysis. Ultimately, the simplicity that is its asset also severely limits its probative value.

In sum, on remand the district court should discount the weight to be accorded plaintiffs' regression analysis because of the failure to include an explanatory variable only upon a showing by the defendant that the missing variable is a determinant of salary and correlates with sex, and thus is likely to cause a demonstrable, rather than an assumed, underadjustment bias. Any regressions should include rank as a variable, while inclusion of any other contested variables will depend on the facts relevant to that variable. The failure, by either side, to include a relevant variable (or the inclusion of an irrelevant or multicollinear variable) will go to the probative value of the analysis, not its admissibility.

B. *The Focus on Pre-1972 Hires.*

A major focus of the district court on retrial should be on the disparity affecting female faculty members hired before 1972. But we do not foreclose plaintiffs from seeking to demonstrate salary disparities across the entire class of female AECOM

faculty, if that still seems appropriate despite the trial judge's view that "the appearance of discrimination in salaries during the relevant time period resulted from lower salaries paid to female faculty members who had been hired prior to 1972." *Id.* at 1182.

Yeshiva, of course, may attempt to show that there was no salary disparity, even among pre-1972 hires, either before 1972 or since. It may also attempt to demonstrate that even if there was a pre-act disparity, it did not carry over into the actionable time period, after December 1974. To fully succeed, however, such a showing must be made not only as to the entire class, but also as to the pre-1972 hires.

To determine whether a valid *Bazemore* claim exists, the pre-1972 hires must be separately analyzed from the post-1972 group, because a study of the entire class, both pre- and post-1972 hires, would tend to mask any continuing effects of pre-act discrimination. Should the district court find that discrimination against pre-act hires explains the apparent general disparity between men and women, relief could accordingly be targeted to the pre-1972 hires.

C. *Remand to a Different District Judge.*

We reluctantly conclude that it is necessary to remand the case to a different district judge. We frankly are disturbed by the manner in which the district court treated this case on our initial remand. It is clear that, in light of *Bazemore*, the first trial was replete with error, and that a fresh look at the evidence was necessary on remand, along with an opportunity to supplement the record with new evidence relating to the pre-act period and its post-1974 consequences. We intend no criticism of the trial judge's handling of the first trial; he conducted a thorough and searching inquiry after what must have seemed endless discovery, and made detailed findings in his opinion in *Sobel I*. It was only after *Bazemore* that his efforts to that point became inadequate.

While remanding to a different district judge is an "extraordinary remedy * * * [to] be reserved for the extraordinary case",

United States v. Robin, 545 F.2d 775, 784 (2d Cir. 1976)(Timbers, J., dissenting), we believe that this case is, indeed, extraordinary. *Cf. United States v. Spears*, 827 F.2d 705, 709 (11th Cir. 1987)(where district judge apparently evidenced bias against government, reassignment was ordered); *In re Matter of Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986) (even where circuit court rejects contention district court was biased as ground for reversal, and does not doubt district judge's "ability to act fairly", remand to new judge "necessary to preserve the appearance of justice"); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1523 (9th Cir. 1985)("A district court judge's adamance in making an erroneous ruling may justify remanding the case to a different judge.").

CONCLUSION

To summarize, the case is remanded for a retrial which shall include full consideration of plaintiffs' claim that there were pre-1972 salary disparities carried over into the post-1974 limitations period because of Yeshiva's failure to equalize salaries upon its being covered by Title VII, and reconsideration of plaintiffs' claims for the entire class in light of all the evidence, with their regression analyses to be evaluated in accordance with *Bazemore's* principles. There should be a reasonable period for additional discovery, if needed. We suggest that in the interest of economy the parties and the court cooperate in stipulating as to what evidence introduced at the first trial may be deemed part of the record on the retrial, to be considered for whatever probative value it may have in light of *Bazemore* and this opinion.

The judgment of the district court is reversed and the case is remanded to the district court for further proceedings.

APPENDIX B

Edna H. SOBEL, M.D. and Bella C. Clutario, M.D., on Behalf of themselves and other professional faculty members employed by the defendant, Yeshiva University, similarly situated, Plaintiffs,

Equal Employment Opportunity Commission, Plaintiff-Intervenor,

v.

YESHIVA UNIVERSITY, Defendant.

No. 75 Civ. 2232 (GLG).

United States District Court, S.D. New York

March 24, 1987.

Female physicians on faculty of university's college of medicine brought sex discrimination action, and Equal Opportunity Commission joined as plaintiff-intervenor. The District Court, 566 F.Supp. 1166, dismissed claim of discrimination, and physicians appealed. The Court of Appeals, 797 F.2d 1478, reversed and remanded for reconsideration in light of Supreme Court decision. On remand, the District Court, Goettel, J., held that physicians failed to prove prima facie case of disparate treatment with respect to salary based on multiple regression analyses.

Decision adhered to.

E.E.O.C., Washington, D.C., for plaintiff-intervenor; Johnny J. Butler, Acting General Counsel, James N. Finney, Associate General Counsel, Leroy T. Jenkins, Jr., Asst. General Counsel, Gerald D. Letwin, Trial Atty., Richard P. Theis, Trial Atty., of counsel.

Eleanor Jackson Piel, New York City, for plaintiffs.

Sive, Paget & Riesel, P.C., New York City, for defendant; Daniel Riesel, Lawrence R. Sandak, Robert R. Reed, of counsel; Gerald Bodner, Labor Counsel, Yeshiva University.

OPINION

GOETTEL, District Judge:

This Title VII case is before the Court on remand from the Second Circuit Court of Appeals. The facts are set forth at length in our earlier decision, *Sobel v. Yeshiva University*, 566 F.Supp. 1166 (S.D.N.Y. 1983) ("*Sobel I*"), familiarity with which is assumed. In brief, the two named plaintiffs brought this discrimination action on behalf of themselves and other female physicians on the faculty of defendnat Yeshiva University's Albert Einstein College of Medicine ("Einstein"). The Equal Employment Opportunity Commission ("EEOC") joined the suit as a plaintiff-intervenor. Following a bench trial, we dismissed the plaintiffs' claim of pay discrimination, and reserved decision on a claim of discrimination in pension benefits.[1] The later claim was ultimately settled by the parties. The plaintiffs appealed the dismissal of the pay claims;[2] the EEOC did not.[3]

In its brief, per curiam opinion, the Second Circuit directs us to reconsider this case in light of the Supreme Court's recent

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[1] Prior to trial, the plaintiffs withdrew claims of discrimination in promotions and other aspects of employment.

[2] Both the plaintiffs and the defendant appealed our denial of their respective applications for attorneys fees. *Sobel v. Yeshiva University*, 619 F.Supp. 839 (S.D.N.Y. 1985). However, since the recent remand by the Second Circuit makes no mention of the fee appeals, that issue is not presently before us.

[3] Since the EEOC did not appeal, it may not benefit from this remand. *See Cruickshank & Co. v. Dutchess Shipping Co.*, 805 F.2d 465 (2d Cir. 1986); 9 J. Moore, B. Ward, & J. Lucas, *Moore's Federal Practice* ¶ 204.11 [4]-[5] (2d ed. 1986). The EEOC has nevertheless submitted papers on the instant issues and also moves to vacate the final judgment so that it may participate in further proceedings in this matter. Since we conclude that no further proceedings are necessary, we need not rule on the EEOC's motion to vacate judgment. We have, however, read and considered the EEOC's submissions on the remanded matters.

decision in *Bazemore v. Friday*, ____ U.S. ____, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986), "particularly with respect to the significance of preact discrimination and the evidentiary weight to be afforded multiple regression analysis." *Sobel v. Yeshiva University*, 797 F.2d 1478, 1479 (2d Cir. 1986).

Discussion

I. *The Significance of Pre-Act Discrimination*

The parties were directed to brief the issue of whether this suit is affected by *Bazemore's* holding on the significance of pre-Act discrimination. They have failed to do more than state the obvious. The plaintiffs assert that *Bazemore* is directly in point and requires a verdict in their favor. The defendant contends that, since no pre-Act discrimination was established by the evidence, *Bazemore* is inapplicable.

The initial problem in evaluating this case in light of *Bazemore* is that the facts of the two cases differ markedly. In *Bazemore*, prior to August 1, 1965, the North Carolina Agriculture Extention Service (the "Extension Service") had been racially divided into two branches, one white and one black, with differing pay scales. In response to the Civil Rights Act of 1964, the two branches were merged, but disparities in salaries continued. The plaintiffs sued in 1971 aileging racial discrimination in employment and in the provision of services by the Extension Service. The District Court declined to certify a class action and found for the defendants on all issues. The Court of Appeals affirmed. Although the appellate court acknowledged that some pre-existing salary disparity remained,[4] it held that the defendants were not obligated to eliminate salary disparities that originated prior to 1972. The Supreme Court reversed, holding that pre-Act salary discrimination did not excuse perpetuating the discrimination after the Extension Service became covered by Title VII. "To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks." 106 S.Ct. 3006.

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[4] Indeed, the defendants apparently admitted that they had been unable to eliminate all such disparities. *Bazemore*, *supra*, 106 S.Ct. at 3006.

In *Bazemore*, the pre-Act racial discrimination affected *all* blacks and, undoubtedly, was illegal.[5] In the instant action, little evidence was offered to establish if, or how, the defendant discriminated against women prior to 1972, the year in which Title VII became applicable to universities.[6] For female faculty members hired after 1972, the evidence showed an absence of statistically significant differences in salary during the relevant period of 1974 to 1979.[7] *Sobel I*, *supra*, 566 F.Supp. at 1182. Any salary differences during that period seemed to result from lower salaries initially paid to some female faculty members hired prior to 1972. *Id.* However, the evidence showed that this probably resulted not from discrimination, but from several gender-neutral factors.[8]

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[5] Discrimination on the basis of race was made illegal under the thirteenth and fourteenth amendments to the Constitution, and the Civil Rights Act of 1866, 42 U.S.C. §§ 1981, 1983. Long before Title VII was enacted, blacks could assert employment discrimination claims under these existing laws. Today, pay and employment discrimination claims by blacks are often brought both under Title VII and the Civil Rights Act. Sexual pay discrimination, however, is solely a product of Title VII, and claims in that regard did not exist for pre-Act periods.

[6] Women were certainly not discriminated against in hiring, since Einstein had a higher percentage of women on its faculty than most of the other medical schools in the country. *See Sobel I*, *supra*, 566 F.Supp. at 1169 n.8.

[7] The plaintiffs filed this suit in 1975. The "relevant period" for the plaintiffs' claims began in 1974, because that was the earliest year open under the applicable statute of limitations. Although the plaintiffs contend that we failed to consider proof of matters occurring prior to 1974, their accusation is unfounded. Evidence of facts and events occurring beyond the limitations period may be used to establish the motive or intent of actions taken within the open period. When such evidence was offered, we accepted it for that purpose.

[8] For example, the female faculty members at Einstein were generally younger and less experienced than their male counterparts, probably reflecting women's later entrance into the medical field, and women more often specialized in less lucrative specialties, such as pediatrics and psychiatry. Since experience and area of specialization were factors in establishing salaries, the net result was often lower pay for women. Pay increases, however, were found to be neutral "both in principal and in operation." *Sobel I*, *supra*, 566 F.Supp. at 1188. In fact, the guideline system for pay increases may have favored women. *Id.* at 1183-84. Also, as we noted in our original decision,

(footnote continued)

Throughout the lengthy pretrial proceedings and most of the trial of this case, the plaintiffs endeavored to prove discrimination on a theory of disparate treatment of female faculty at Einstein during the years 1974 to 1979. Despite seven years of discovery and elaborate statistical analyses by notable experts, the evidence failed to support this claim.[9] When this became evident at trial, the plaintiffs switched to a theory of disparate impact, claiming that discriminatory acts prior to the relevant period created a continuing discriminatory effect on the plaintiffs' salaries.

> During the late 1960's and early 1970's, Einstein was in difficult financial straits caused, at least in part, by the opening of its own hospital in the Bronx at a time when the need for a new hospital was not economically apparent. Consequently, it appears that most of Einstein's faculty members were not paid what they were worth. Raises tended to go only to those who made a great fuss about the failure to receive an adequate salary. In most instances, those who protested were men who were the sole sources of income for their families. (Although no statistics were presented on this matter, we take it as an accepted sociological fact that the percentage of men who were the sole wage earners for families with children exceeded the percentage of married women who were such.) This tendency to favor the sole working members of families appears to have disappeared in the 1970's as circumstances changed.

Sobel I, *supra*, 566 F.Supp. at 1184 n.49. This policy, which, in the late 1960's and early 1970's, was considered not only socially acceptable but also socially desirable, more often favored men. However, to the extent that a woman was the sole wage earner for a household she benefitted rather than suffered from the policy.

[9] A disparate treatment claim requires proof that the defendant intended to discriminate, and that discrimination was a regular, rather than unusual, practice in the treatment of the class on behalf of which the action is brought. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 224, 335 n.15, 336, 97 S.Ct. 1843, 1854 n.15, 1855, 52 L.Ed.2d 396 (1977). Besides the weakness of the statistical evidence and the almost total absence of anecdotal proof of discrimination, the evidence presented by the defendant revealed a decentralized administration with responsibility for salary decisions delegated to department heads, and an absence of motive or opportunity to discriminate against highly trained professionals in a competitive market, all of which tended to disprove the plaintiffs' discrimination claims. *See Sobel I*, *supra*, 566 F.Supp. at 1186.

At the time this case was tried, claims of disparate impact required proof of a present violation of Title VII, not merely a past act of discrimination with ongoing effects. *United Airlines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). Although *Bazemore* does not explicitly overrule *Evans*, it seems to call into question the continued validity of *Evans'* approach to proving disparate impact claims. Had we relied solely on *Evans* in dismissing the plaintiffs' disparate impact claim on the merits, our prior ruling might require reconsideration. However, we dismissed that claim not only on the merits, but also on the procedural ground of unfairness to the defendant. *Sobel I, supra*, 566 F.Supp. at 1186-89. The latter is an adequate independent ground for dismissal, regardless of whether *Bazemore* overruled *Evans sub silencio*. In dismissing the plaintiffs' disparate impact claim on procedural ground, we stated as follows:

> For seven years prior to the trial and throughout much of the trial ifself, the defendant was confronted solely with a claim of disparate treatment. Much of the Court's purpose is permitting the parties so much time to prepare this case was to ensure full and fair discovery and complete development of all the legal issues that might arise at trial. Thus, to allow the plaintiffs to adopt a completely different theory of liability at such a late date, particularly when in the years preceding the trial they gave little if any indication that they were claiming disparate impact, would be to work a gross injustice on the defendant.

Id. at 1187 (footnote omitted).

The plaintiffs not only waited until the last minute to assert their disparate impact claim, they presented scant evidence to support such a claim, and even that was flawed. *See infra* section II.A. It would be highly prejudicial to the defendants at this point to reopen the case and allow further discovery by the plaintiffs on the unlikely chance that they could now develop

a viable disparate impact claim tailored to *Bazemore*'s holding.[10] We see no reason to change our decision dismissing this claim on procedural grounds. Accordingly, we need not consider whether, after *Bazemore*, the claim also fails on the merits.

II. *The Weight to be Afforded Multiple Regression Analysis*

It is not clear why the Court of Appeals felt that *Bazemore* might require any change in this Court's original assessment of the weight to be afforded multiple regression analyses. On appeal, the plaintiffs argued that this Court "rejected" the multiple regression analysis they offered in evidence. Plaintiffs' Appellate Reply Brief at 6. That is incorrect;[11] with a single exception, discussed below in subsection A, all of the plaintiffs' multiple regressions *were* received in evidence. This Court, however, did not find them to be conclusive and, indeed, found serious defects in the approaches used by the plaintiffs' experts. On this remand, the plaintiffs shift their argument from one of admissibility to one of acceptance. They contend that *Bazemore* requires that multiple regression analyses not only be admitted and considered by the Court, but also be accepted. *Bazemore* does not stand for that proposition.

In *Bazemore*, the Court of Appeals affirmed the District Court's ruling that the plaintiffs' regressions were unacceptable as evidence of discrimination because they omitted a number of variables that could have affected salary levels. The Supreme Court, reversing, held that

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[10] In view of the evidence presented, we question whether such a case could ever have been successful. Had the *Bazemore* decision been available in 1983 when this case was tried, or, better yet, in 1975 when the suit was filed, the plaintiffs might have focused more specifically on a disparate impact claim. However, this is speculative hindsight since *Bazemore* was not decided until three years after this case was tried. And, as indicated above, the factual differences between this case and *Bazemore* make the latter's application here both difficult and questionable.

[11] This error is not surprising, however, since the plaintiffs were represented on appeal by their third attorney, who was not involved in the trial of this action.

> a regression analysis that includes less than "all measurable variables" may serve to prove a plaintiff's case. A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. Whether, in fact, such a regression analysis does carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant.

106 S.Ct. at 3009 (citation omitted). This holding instructs us to consider multiple regression analyses regardless of the omission of arguably relevant variables, *but*, to weigh them in light of all evidence presented by both sides. This is precisely the consideration we gave the plaintiffs' regressions.

At trial, the plaintiffs relied heavily on statistical proof. We noted that this approach was acceptable as a means of proving discrimination, and stated,

> In such a case, the court's task is to determine whether the plaintiff's statistics make out a prima facie case of a practice or pattern of discrimination, and, if so, whether that case is fatally undercut by a showing that the plaintiff's "proof is either inaccurate or insignificant." [*International Brotherhood of*] *Teamsters v. United States*, *supra*, 431 U.S. at 360, 97 S.Ct. at 1867. Of course, in determining whether the plaintiff has established a prima facie case, the court should not ignore the defendant's relevant evidence of nondisparate treatment. "Prima facie evidence means the 'net of the evidence;' that is, the court must consider the evidence presented by both parties." *Underwood v. Jefferson Memorial Hospital*, 639 F.2d 455, 457 (8th Cir. 1981).

Sobel I, *supra*, 566 F.Supp. at 1173.

Unfortunately, the plaintiffs' statistical proof was seriously flawed. *Id.* at 1178-85. The EEOC concedes that the regressions had "some unqualifiable productivity variables that could not be controlled for. The omission of these variables always is a basis for legitimate concern." EEOC Reply Memorandum at 19. We previously commented as follows:

> Although the plaintiffs correctly argued that, in order to make out a prima facie case, they were not required to produce a perfectly designed or specified model, but rather one that only roughly controlled for the necessary considerations, the plaintiffs failed to produce a model that met even this lesser standard.

Sobel I, supra, 566 F.Supp. at 1182. When the plaintiffs incorporated additional data and variables suggested by the defendant, the plaintiffs' regressions made only a borderline showing of discrimination (slightly more than two standard deviations), and then only for certain years. *Id.* at 1176, 1181.

Moreover, the plaintiffs' regressions were virtually the only evidence presented with respect to the class. The named plaintiff, Edna H. Sobel, testified about her experiences. However, her situation was somewhat unique. Indeed, by being a "squeaky wheel," she got some pay increases that others did not. *See id.* at 1185, 1188 n.56. Her testimony, standing alone, did little or nothing to assist the classwide claims. The other named plaintiff did not testify.

> There was, therefore, none of the direct evidence of discrimination with respect to any particular class member that might have provided an acceptable means of proving discrimination in a case of this nature. . . . It seems reasonable to assume that, if there had been classwide discrimination, the plaintiffs should have been able to demonstrate some instances of discrimination against individuals. The absence of any such anecdotal evidence casts considerable doubt on the plaintiffs' claims. This is particularly true in a case such as this where discovery was undertaken

> over a seven-year period, with all of the resources of the EEOC available for the last several years.

Id. at 1186 (footnote and citation omitted). *See Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604 (2d Cir. 1986); *EEOC v. Sears, Roebuck & Co.*, 628 F.Supp. 1264, 1280-87 (N.D.Ill. 1986). This is in sharp contrast with *Bazemore*, in which "petitioners offered an impressive array of evidence to support their contention [of salary discrimination]." 106 S.Ct. at 3010. *See also International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977) ("[I]ndividuals who testified about their personal experiences . . . brought the cold numbers convincingly to life.").

In considering this issue in *Bazemore*, the Supreme Court reversed because the lower court had focused solely on the inadequacy of the regression analysis and had ignored additional evidence of discrimination. 106 S.Ct. at 3002. We did not similarly limit our consideration of the evidence in the instant suit. Rather, we concluded, upon examination of all of the evidence from all parties, "that the plaintiffs have failed to prove a prima facie case of disparate treatment with respect to salary. They have failed to carry their burden of persuasion for both the individual and the class claims." *Sobel I*, *supra*, 566 F.Supp. at 1186. We find that *Bazemore* requires no change in this conclusion.

A. *Exhibit 111*

In remanding this case, the Court of Appeals made no reference whatever to the trial court's refusal to receive plaintiffs' Exhibit 111 in evidence. Both the Court and the parties are uncertain whether this is an issue on remand. However, since Exhibit 111 was the *only* instance in which a regressioin was not received in evidence, and since it constituted virtually the only proof of a disparate impact claim, prudence dictates a reconsideration of our ruling in that regard.

Exhibit 111 was rejected on two separate grounds, one procedural and one substantive. The substantive ground concerned our interpretation of *United Airlines, Inc. v. Evans*, *supra*,

431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977). As noted above in section I, while not specifically overruling *Evans*, *Bazemore* at least calls into question the continued validity of its approach to proof of disparate impact claims. However, this need not alter our ruling, which was based on the separate and completely independent procedural basis of untimeliness.

As already mentioned, this case went through many years of extensive discovery. It was developed and tried as a disparate treatment case. The evidence available to the defendants at trial related to the period from 1974 to 1979. At the very conclusion of the plaintiffs' rebuttal case, they offered Exhibit 111 to support a claim of disparate impact. The exhibit contained the statistical flaws mentioned above, without addressing the major criticisms raised by the defendants' experts. The exhibit was of little probative value since the plaintiffs had failed to assemble an adequate data base regarding faculty employed prior to 1974.[12] However, the major reasons for refusing to receive Exhibit 111 in evidence was its untimely submission.[13] *Sobel I*, *supra*, 566 F.Supp. at 1182 n.40. The defendant's experts indicated that they would require a lengthy adjournment of the almost completed trial as well as substantial additional trial time to respond to the exhibit. This Court stated at trial that,

> if this [Exhibit 111] were vital, new, different evidence, I think I would undergo the inconvenience to the rest of the trial schedule. But it is just an attempt to deal with some of the criticism, and to my way of thinking not the major criticism. I think the major criticism of the multiple linear regression studies is the inability to deal with productivity in a meaningful sense and to find proxies that will capture the missing productivity.

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[12] In addition, the pre-1974 regressions did not contain variables that the plaintiffs' experts conceded at trial were indispensable to a properly specified model and which they used for the 1974-1979 period.

[13] The pretrial discovery orders required that data base objections be completed in the spring of 1982, that statistical reports be exchanged in June 1982, and rebuttal reports in July 1982.

Trial Transcript at 2713-14.

The EEOC offers a curious argument that, although this Court's rejection of Exhibit 111 at trial was perhaps proper, it should now be admitted to "assist the Court of Appeals in assessing the merits of this case if a subsequent appeal should be taken." EEOC Reply Memorandum at 13. Evidence is received in the trial court. To justify introducing new evidence and a new legal theory after seven years of discovery, and a three-week trial, a party must establish both that it was not responsible for this delay (usually by establishing that the other side caused it) *and* that the evidence is highly probative and warrants the extraordinary exercise of the Court's discretion in accepting it. Here, the plaintiffs failed in both regards. They neither justified their tardy change of direction and proof, nor produced a document that clearly, on its face, would have changed the trial results. Consequently, the Court declines to reconsider its evidentiary ruling excluding Exhibit 111, or to direct that it be added to the record for purposes of appellate factual review.

Conclusion

The Court, having reconsidered the case pursuant to the direction of the Court of Appeals, adheres to its earlier decision and directs entry of judgment for the defendant.

SO ORDERED.

APPENDIX C

EDNA H. SOBEL, M.D. and BELLA C. CLUTARIO, M.D. on behalf of themselves and on behalf of other professional faculty members employed by the Defendant Yeshiva University, similarly situated, Plaintiffs,

EDNA H. SOBEL, M.D.,
Plaintiff-Appellant-Cross-Appellee,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor, Appellee,

v.

YESHIVA UNIVERSITY, EPHRAIM FRIEDMAN, M.D., CHESTER EDELMAN, JR., M.D., EMANUEL GENN, HENRY L. BARNETT, M.D., LABE C. SCHEINBERG, HAROLD SCHULMAN, M.D., NEAL BRICKER, M.D., EDWARD J. HEHRE, M.D., HENRY P. LAUSON, M.D., and ARTHUR S. ABRAMSON, M.D., Defendants-Appellees,

YESHIVA UNIVERSITY,
Defendant-Appellee-Cross-Appellant.

United States Court of Appeals
Second Circuit.

Nos. 1451, 1526, Dockets 85-9019, 85-9061.

Argued Aug. 12, 1986.

Decided Aug. 20, 1986.

Appeal from a judgment of the United States District Court for the Southern District of New York; Gerard L. Goettel, Judge.

Eleanor Jackson Piel, New York City, for plaintiff-appellant-cross-appellee Edna H. Sobel.

Daniel Riesel, New York City (Mark A. Chertok, Lawrence R. Sandak, Gerald A. Bodner, Sive, Paget & Riesel, New York City, of counsel), for defendant-appellee-cross-appellant Yeshiva University.

Dianna B. Johnston, Washington, D.C., for plaintiff-intervenor, appellee E.E.O.C.

Before PRATT and MINER, Circuit Judges, and EDWARD D. RE, Chief Judge of the United States Court of International Trade, sitting by designation.

PER CURIAM:

In this Title VII case plaintiffs, full-time faculty members of the Albert Einstein College of Medicine of Yeshiva University, appearing individually and on behalf of a class of women similarly situated, claimed that Yeshiva University discriminated against them on the basis of their sex. After a bench trial the court below concluded that plaintiffs failed to present a *prima facie* case of pay discrimination and, accordingly, dismissed the claim. *See Sobel v. Yeshiva University*, 566 F.Supp. 1166, 1168 (S.D.N.Y. 1983).

After the district court issued its opinion the Supreme Court decided the case of *Bazemore v. Friday*, __ U.S. __, 106 S.Ct. 3000, 92 L.Ed.2d 315(1986). Because the court below did not have the benefit of the views of the Supreme Court in *Bazemore*, particularly with respect to the significance of pre-act discrimination and the evidentiary weight to be afforded multiple regression analysis, we remand for reconsideration and if necessary, further proceedings in light of *Bazemore*.

Reversed and remanded.

APPENDIX D

EDNA H. SOBEL, M.D., and BELLA C. CLUTARIO, M.D., on behalf of themselves and other professional faculty members employed by the Defendant, Yeshiva University, similarly situated, Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Intervenor,

v.

YESHIVA UNIVERSITY, Defendant.

No. 75 Civ. 2232 (GLG).

United States District Court, S.D. New York.

June 24, 1983.

Female medical doctors employed by university medical school brought action individually and on behalf of all female physicians who, at some point in relevant time period, were employed as full-time members of medical school's faculty, alleging sex discrimination with respect to both salaries and pensions. The District Court, Goettel, J., held that: (1) plaintiffs failed to prove prima facie case of disparate treatment with respect to salaries; (2) plaintiffs failed to establish claim of disparate impact with respect to salaries; (3) university's pension plan, which was premised upon sex-segregated mortality tables, constituted unlawful discrimination; and (4) decision upon appropriate remedy would be deferred.

Ordered accordingly.

Specter & Buchwach, P.C., Pittsburgh, Pa., for plaintiffs and the class; Howard A. Specter, Michael D. Buchwach, Pittsburgh, Pa., of counsel.

E.E.O.C., David L. Slate, Gen. Counsel, James N. Finney, Associate Gen. Counsel, Jane L. Dolkart, Asst. Gen. Counsel, Estelle D. Franklin, Acting Supervisory Trial Atty., Washington, D.C., for plaintiff-intervenor; Richard P. Theis, Gary T. Brown, Washington, D.C., of counsel.

Sidney Schutz and Winer, Neuburger & Sive, P.C., New York City, for defendant; Daniel Riesel, Mark A. Chertok, Lawrence R. Sandak, New York City, of counsel.

AMENDED OPINION*

GOETTEL, District Judge:

Mark Twain supposedly once said that there are three kinds of lies: lies, damned lies, and statistics. Though perhaps hyperbolic, this declaration of distrist aptly warns that any conclusion based on statistics may be unsound. It is most unfortunate, therefore, that the evidence in this case is almost completely statistical.

From December 20, 1974, to October 15, 1979 (the "relevant time period"), the named plaintiffs in this class action, Edna H. Sobel and Bella C. Clutario, were medical doctors employed by defendant Yeshiva University ("Yeshiva") as full-time faculty members of its medical school, the Albert Einstein College of Medicine ("Einstein"), which is located in New York City. The class which Sobel and Clutario represent consists of all female physicians who, at some point during the relevant time period, were employed as full-time members of Einstein's faculty.[1] At trial, the plaintiffs claimed that during the relevant time

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* This amended opinion supersedes and replaces the opinion filed by this Court on May 25, 1983.

[1] From the outset, it has been conceded that the defendant is an "employer," as that term is defined under 42 U.S.C. § 2000e(b) (1976), and that the Court has jurisdiction over the parties and the subject matter of this action.

period the defendant discriminated against them with respect to both salaries and pensions. For reasons discussed below, however, the Court has concluded that the plaintiffs have failed to prove both of these claims, except to the extent that they have established that Yeshiva's pension plan is illegally premised upon gender-based actuarial tables.

I. PROCEDURAL BACKGROUND

In their original complaint, filed on May 9, 1975, Sobel and Clutario claimed that Yeshiva, through Einstein, was intentionally discriminating, with regard to salaries and other terms of employment, against female faculty members who held M.D. degrees and worked in the Pediatrics Department. Believing themselves to be the victims of illegal sexual discrimination, the plaintiffs sought back pay[2] and other forms of relief authorized under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976 & Supp. V 1981).[3]

On June 18, 1975, plaintiff Sobel filed her charge of discrimination with the Equal Employment Opportunity Commission (the "EEOC"), alleging gender-based discrimination in pay and in the amount of Yeshiva's contributions to her pension plan due to such lower pay. On the same date, plaintiff Clutario filed a similar charge with the EEOC.

After June 1975, the plaintiffs' claims in this action were substantially altered by a number of events. The EEOC issued "right to sue" letters to the plaintiffs on March 19, 1976. The plaintiffs amended their complaint on June 16, 1976, to include

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[2] The plaintiffs have since acknowledged that, pursuant to 42 U.S.C. § 2000e-5(g) (1976), any liability for back pay accrued only from June 18, 1973, or two years prior to the filing of their charges with the Equal Employment Opportunity Commission (the "EEOC").

[3] The plaintiffs also alleged violations of section 1 of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976), and violations of various sections of the Civil Rights Acts, 42 U.S.C. §§ 1981, 1983 & 1985 (1976). The claims under sections 1981, 1983, and 1985 were withdrawn by the plaintiffs not long before the trial commenced.

as defendants the chairpersons of certain departments at Einstein. Also, by virtue of that amended complaint, the class grew to include all female physicians who were employed by Yeshiva at any time during the relevant time period and who held the rank of instructor, assistant professor, associate professor, or full professor, whether in a full-time or part-time capacity.[4] Claims of gender-based discrimination in pay, promotion, and other terms and conditions of employment were alleged on behalf of the class. Later, on May 31, 1977, the Court granted the EEOC's motion to intervene as plantiff, in the belief that the EEOC might be more experienced than the individual plaintiffs in the use of statistics to prove gender-based discrimination in a professional education setting.

Although these events bespoke a general tendency to add, or attempt to add,[5] issues and parties, the case was ultimately greatly simplified before trial. The group to be analyzed was limited to full-time faculty members of Einstein.[6] The claims against all individual department heads were dropped and Yeshiva became the sole defendant. The claims of discrimination in promotion and tenure were withdrawn and those concerning other more amorphous conditions of employment were not pursued. Thus, the case was ultimately reduced to the relatively narrow issue of whether, with respect to pay and pension benefits, Yeshiva had discriminated against the full-time female doctor-professors of Einstein.

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[4] A sub-class was created as well. It consisted of all female physicians who, during the relevant time period, were classified as full-time or part-time faculty members of Einstein in the above-stated ranks and who received salaries from affiliated institutions such as Montefiore Hospital and Medical Center, Bronx Lebanon Hospital, Bronx State Psychiatric Hospital, and Bronx Children's Psychiatric Center. Claims alleged on behalf of this sub-class concerned discriminatory promotions only and were withdrawn before trial along with all other claims involving promotions. *See infra*.

[5] For example, an unsuccessful attempt was made to add those female professors who did not hold M.D. degrees.

[6] Full-time faculty members are defined as those who gave their total professional commitment to Einstein and who, therefore, received all of their compensation from Yeshiva.

Despite the narrowness of the issue and the fact that only the question of liability was tried (the question of damages having been reserved for the second part of these bifurcated proceedings), the trial lasted approximately three weeks and involved voluminous submissions by both parties. Throughout most of the trial, the plaintiffs continued their long-held strategy of trying to prove their pay claims under the theory of "disparate treatment." Thus, they attempted to show that Yeshiva and Einstein (hereinafter used somewhat interchangeably) intentionally engaged in a pattern or practice of discriminatory treatment during the relevant time period and that such treatment constituted the standard operating procedure at the college. As the trial continued and the evidence developed, however, the plaintiffs felt compelled to resort to a theory of "disparate impact" as well. Under this second theory, they attempted to prove that, while the procedure at Einstein might appear neutral on its face, it in fact had an unjustifiably harsh and discriminatory impact on the plaintiffs. *See Teamsters v. United States*, 431 U.S. 324, 335-36 n.15, 97 S.Ct. 1843, 1854-55 n.15, 52 L.Ed.2d 396 (1977) (contrasting disparate treatment and disparate impact). The procedural propriety of this shift in theories, as well as the merits of the plaintiffs' claims, cannot be discussed, however, until after a few basic facts have been set forth.

II. THE FACTS

A. *The Organization of the College*

The complex nature of Einstein's organization made statistical analysis of its employment practices difficult. Einstein's faculty during the relevant time period was extremely large and included approximately 1330 individuals with M.D. degrees.[7] Many of them either worked part-time or were actually staff members of affiliated hospitals and were therefore designated as part of Einstein's faculty even though the college did not pay them. Those faculty members who were paid by the defendant included 626 physicians. Of this latter group, 316 men and 95

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[7] There were some faculty members who held degrees other than an M.D. However, they were not made a part of the class in this action.

women were full-time faculty members.[8] However, these numbers included everyone who worked at any time during the relevant time period.[9] The number of full-time faculty members with M.D. degrees in any given year ranged between 204 and 295, of whom 49 to 60 were women.

Even more impressive than the size of Einstein's faculty, however, was the complexity of its finances. From the date of its founding in 1955, Einstein received numerous public and private grants for its extensive scientific research. It also entered into affiliation contracts to provide patient care at, *inter alia*, the Bronx Municipal Hospital Center and the Lincoln Hospital. In 1966, Einstein also opened its own hospital. In addition to practicing medicine, conducting research, and teaching students at all of these institutions, Einstein's faculty provided similar services to eight other institutions in the New York Metropolitan area.[10] Einstein's income came primarily from payments for the patient care that Einstein's faculty provided at these institutions

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[8] At the time of trial, twenty-eight percent of Einstein's faculty members were women. This figure represented one of the five or six highest percentages for all of the medical schools in the country and compared very favorably to the national mean of sixteen percent. Furthermore, although the average age and experience of Einstein's female faculty members was less than the average age and experience of its male faculty members (apparently reflecting the increased entrance of women into the medical profession in recent years), two of the seven departmental chairpersons who were appointed during the period in question were women. Female faculty members also served on the Committee on Appointments and Promotions and the Associate Professors Committee, the two faculty committees responsible for determining appointments and promotions to the higher ranks.

[9] For example, at the beginning of the relevant period, there were 54 women employed. Although some of them later left, 42 more became faculty members as the years progressed. Consequently, a total of 96 women were employed as full-time faculty members at one time or another during the relevant time period.

[10] Those institutions were the Bronx Lebanon Hospital, the Bronx Psychiatric Center, the Bronx Children's Psychiatric Center, the North Central Bronx Hospital, the Beth Abraham Hospital, the Morrisania Hospital, the Sound View-Throgs Neck Community Mental Health Center, and the Bronx Developmental Services.

and from research grants. Only a very small portion of its total income came from the tuition paid by its students.

The activities and responsibilities of Einstein's professors varied enormously. Some were involved primarily in classroom teaching, others in research, and still others in the clinical instruction of students. Of course, many of the professors were involved in two or three of these activities.

A particular professor's responsibilities also depended in great part upon his or her particular department, specialty, and subspecialty. Einstein had twenty-eight primary departments, each headed by a chairperson who had overall responsibility for running the department, including making budgetary and salary recommendations.[11] These departments typically fell into one of two categories: preclinical and clinical.[12] The faculty members in the preclinical departments were primarily responsible for classroom instruction and laboratory research, while the faculty members in clinical departments had substantial responsibility for the administration of services and the instruction of students, interns, and residents in the hospital settings.

Not surprisingly, the economic rewards tended to vary with the lucrativeness of the activities the professors pursued. For example, those individuals who devoted substantial time to private practice would see this reflected in the amount of their total pay.[13] Also, as a general proposition, those physicians who

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[11] During this period, five of the chairpersons were women. One of these, Dr. Lucille Shapiro, has been promoted from Chairperson of the Department of Molecular Biology to Director of the Division of Biological Sciences, in which capacity she supervises and coordinates the activities of six departments.

[12] To a great extent, a student's medical education consists of an initial two years of primarily preclinical instruction in the classroom and a final two years of predominantly clinical instruction in various hospital settings.

[13] The handling of income from private practice varied from department to department. Although all payments were initially collected by the college, physicians in some departments were allowed to receive a portion of their private practice income, while those in other departments were paid a base salary that reflected the amount that their private practice contributed to meeting the departments' expenses.

engaged primarily in research were compensated at rates lower than those who engaged in clinical activities.[14] Those who were primarily classroom teachers received the least income. Moreover, within the group of professors who were primarily clinicians, their total income varied according to their specialties and sub-specialties. Typically, those in specialties which were hospital oriented and "essential," such as surgeons, anesthesiologists, and radiologists, were the most highly compensated.[15]

Finally, of greatest importance to this case, it appears that the women professors tended to specialize more in the non-clinical fields, and even those in clinical fields were typically in non-hospital related specialties such as pediatrics.[16] These tendencies and the other factors described above make it extremely difficult to treat all doctor-professors equally for statistical purposes, even if allowance is made for age and experience. The number of variables reveals, in fact, that the various positions were simply not fungible.

B. *Initial Salaries*

Throughout the period in question, Einstein followed a fairly standard procedure for determining initial salaries. The chairperson of a department would recommend the initial salary for a new faculty member, who was usually to be hired as either

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[14] An exception to this was the researcher who was able to attract a major grant, primarily because the holder of such a grant received additional compensation for the administrative responsibilities that were attached to the grant. Interestingly, during the relevant time period, about five times as many men as women held large research grants from such major sources as the National Institutes of Health.

[15] Why the hospital oriented specialties were favored was not explored in any detail at trial, but the higher rate of compensation might have been related to the coverage provided by medical insurance, which was generally more comprehensive for hospital related expenses than for those expenses incurred during office visits.

[16] There is no evidence to suggest that the women professors were coerced or compelled in any way in their selection of specialties and activities.

an instructor or assistant professor. In formulating this recommendation, the chairperson would consider several factors, including: the person's prior salary, specialty, sub-specialty, and clinical research; the needs of the college; and the demand for such a person in the open market. Also, for anyone who had already held a faculty position, the chairperson would look for such indications of productivity as faculty rank, the quantity and quality of publications, and the winning of any grants.

Each year, only a handful of outside scholars would be hired at the more senior ranks of associate professor and full professor. In particular, this might be done when a new departmental chairperson was to be appointed. The chairperson would be selected by the Dean upon the recommendation of a faculty search committee. Anyone appointed chairperson would receive additional compensation for the extensive administrative responsibilities that accompanied such a position. Each chairperson was the one member of his or her department who was to report directly and regularly to the Dean.[17]

The Dean was responsible for the establishment of salary scales, or "ranges," for both the preclinical and clinical departments. These ranges were determined in part by gathering comparable information from other medical schools. While the ranges of both the preclinical and clinical departments were calibrated to reflect faculty rank and the number of years within a particular rank, only the clinical departments' ranges also took into account individuals' specialties.[18]

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[17] Responsible for the development and implementation of policies in the college of medicine, the Dean maintained a substantial professional staff (with titles such as "Associate Dean" and "Assistant Dean"), whose duties were primarily administrative in nature and thus not comparable to those of the other faculty members. The Dean's office had little involvement in the determination of salaries initially paid to younger professors, whose appointments were usually for only a year or two.

[18] Of course, as has already been mentioned, other factors also influenced faculty salaries. Not only did those in clinical departments tend to make more than those in preclinical departments but also those who actively practiced medicine tended to make more than those who primarily did research. The

(footnote continued)

C. *Salary Increases*

Salary increases for Einstein's professors were generally based on a "guideline increment" system. This system took into account annual increases in the cost of living as well as Einstein's financial resources and had been implemented to control faculty salary expenditures and to assure a balanced budget. The guideline increases took one of three forms: either a percentage of present salary, a fixed amount, or a combination of a salary percentage and a fixed amount. The guideline increases were determined annually by the Dean in consultation with his staff and the departmental chairpersons. During most of the relevant time period, the guideline increases merely approximated the annual increases in the cost of living, but in some years even fell short of the change in that indicator. As a result, those receiving a guideline increase typically received no increase in real earning power. Only someone who was promoted in faculty rank, and was thereby awarded an additional increment of five percent would see such an increase in real income.

After the guideline increases were determined, each department submitted to the Dean a budget, which included the various increases that the department recommended for its members. Any recommendation for an increase equivalent to the guideline increase was routinely approved, while a recommendation for a non-guideline increase was carefully reviewed and had to be justified.[19]

An above-guideline increase might be granted to reward an individual for outstanding production or exceptional achievement, or to compensate a person for assuming additional duties or administrative responsibilities, or to correct what was thought

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latter factor presented an additional problem for plaintiffs' experts, whose initial analyses did not account for the fact that only those holding New York licenses are able to practice medicine in that state and that some of Einstein's faculty did not hold such licenses.

[19] Because of their stronger economic position, the Departments of Radiology and Anesthesiology were permitted to develop their own guidelines for some of the years in question.

to be an unduly low salary. An increase made for the last purpose was sometimes referred to as an "inequity" increase. Such an increase would be granted, for example, when there was a need to equalize the lower salaries of long-appointed faculty members and the higher salary of someone recently hired.

Below-guideline increases were also made. For example, a faculty member who gave up either administrative responsibilities or activities that had generated income for the college, might receive a below-guideline increase. Also, on occasion, severe budgetary constraints within a department might compel below-guideline increases for some or all of its members.

In sum, although the majority of faculty members received guideline increases each year, departmental chairpersons possessed discretion to recommend non-guideline increases. These discretionary increases were carefully scrutinized by the Dean's office, which would approve, disapprove or modify them. Whatever increases the Dean finally endorsed became the actual increases that the faculty members received.[20]

D. *Promotions in Rank*

As mentioned earlier, the only way to receive an increase in real income was to be promoted. Promotions, however, were handled in a totally different manner than were salary increases. Appointments and promotions to senior ranks were recommended by one of two standing faculty committees which were independent of the Dean.[21] In each case, an ad hoc committee

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[20] Almost all increases took effect on July 1st. However, on a rare occasion, such as when a faculty member was burdened with a great increase in duties or received an outstanding offer from another institution, a midyear adjustment would be approved and implemented.

[21] The Committee on Apointments and Promotions, comprised of faculty members of the rank of full professor, considered apointments and promotions to that rank and, prior to the 1976-1977 academic year, to the rank of associate professor. After 1977, the Associate Professors Committee was formed to consider appointments to the rank of associate professor. This latter committee consisted of associate and full professors.

comprised of faculty members would be formed to determine whether a candidate had satisfied the criteria for promotion and to issue a nonbinding recommendation and report to the relevant standing committee. The criteria for promotion included creative scholarship, the quality of research, the quality of teaching, the extent and quality of clinical and administrative service, and the national or international reputation of the candidate. Thus, in contrast to the factors which were determinative of salary increases (the generation of revenue from private practice, one's specialty and sub-specialty, competing job offers, and the availability of funds), the primary consideration in a promotions decision was the quality of the candidate's work. The type of work done and the financial rewards adhering to it were of little or no importance.

Five years in a given rank was typically the minimum period spent before consideration for promotion to the next senior rank was given. Of course, after a faculty member had reached the highest rank, that of professor, no further promotions were available, and creative scholarship and scholastic achievement could be rewarded only by above-guideline pay increases or by appointment to an administrative position with its attendant increase in compensation.

III. DISCUSSION

A. *Statistical Proof Generally*

As noted earlier, the plaintiffs relied extensively upon statistics in their attempt to prove their case. Such a heavy reliance upon statistical evidence in employment discrimination cases has, of course, been widely accepted by the courts and even received the imprimatur of the Supreme Court. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741-42, 53 L.Ed.2d 768 (1977). In such a case, the court's task is to determine whether the plaintiff's statistics make out a prima facie case of a practice or pattern of discrimination, and, if so, whether that case is fatally undercut by a showing that the plaintiff's "proof is either inaccurate or insignificant." *Teamsters v. United States*, *supra*, 431 U.S. at 360, 97 S.Ct. at 1867. Of course,

in determining whether the plaintiff has established a prima facie case, the court should not ignore the defendant's relevant evidence of nondisparate treatment. "Prima facie evidence means the 'net of the evidence;' that is, the court must consider the evidence presented by both parties." *Underwood v. Jefferson Memorial Hospital*, 639 F.2d 455, 457 (8th Cir. 1981); *see also Equal-Employment Opportunity Commission v. E.I. Dupont de Nemours & Co.*, 445 F.Supp. 223, 232, 243 (D.Del. 1978). Thus, this Court has carefully weighed both the plaintiffs' and the defendant's statistical proof before deciding whether a prima facie case of discrimination has been presented.

Here, the plaintiffs' experts designed a multiple regression model to estimate the effects that various independent variables had upon the single, dependent variable – salary level. When properly used in a Title VII case, this "methodology provides the ability to determine how much influence factors such as sex, experience, and education each have had on determining the value of a variable such as salary level." *Coble v. Hot Springs School District No. 6*, 682 F.2d 721, 731 (8th Cir. 1982).

Significantly, the courts have generally accepted the idea that the plaintiff, to establish a prima facie case by statistical evidence, is required to demonstrate a difference of more than two or three standard deviations between the expected incidence of a particular type of event (or, as in this case, the expected level of salary for the minority in question) and the actual incidence of such events (or actual level of the minority's salary).[22]

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[22] A proven disparity of 2.0 standard deviations enables one to conclude that a larger disparity than that which was actually observed would occur as a result of chance only one out of twenty times. Expressed differently, such a disparity would be significant at approximately the 0.05 level of probability. Similarly, a proven disparity of 3.0 standard deviations enables one to conclude that a larger disparity would occur as a result of chance approximately one out of a hundred times and and that such a disparity would, therefore, be significant at approximately the 0.01 level of probability. "Thus, for large samples, the '2 or 3 standard [deviation]' rule is essentially equivalent to a rule requiring significance at a level in the range below 0.05 and 0.01." D. Baldus & J. Cole, Statistical Proof of Discrimination § 9.03, at 297 (1980).

See, e.g., Hazelwood, supra, 433 U.S. at 308-09 n.14, 97 S.Ct. at 2742 n.14; *Castaneda v. Partida*, 430 U.S. 482, 496-97 n.17, 97 S.Ct. 1272, 1281-82 n.17, 51 L.Ed.2d 498 (1977); *Board of Education of the City of New York v. Califano*, 584 F.2d 576, 584 n.29 (2d Cir. 1978), *aff'd*, 444 U.S. 130, 100 S.Ct. 363, 62 L.Ed.2d 275 (1979). Although some have suggested that such an absolute requirement should not be imposed in all cases, *see, e.g., Hilton v. Wyman-Gordan Co.*, 624 F.2d 379, 381 (1st Cir. 1980), few would disagree that where, as here, the fungibility of the faculty of a medical college is considerably in question and the number of independent variables so great, one can have little confidence in drawing inferences from statistics that reveal a disparity that is significant at a level of less than two standard deviations.[23]

B. *Plaintiffs' Statistical Analysis*

In attempting to analyze Einstein's unique and complex pay structure, the EEOC retained two outstanding economists and statisticians, Dr. Orley Ashenfelter of Princeton University and Dr. Donald E. Wise of the New Jersey consulting firm of Mathtech, Inc. Despite their being specialists in econometrics (the application of statistics and mathematical modeling to economic problems), this was their first experience with pay and promotions at a medical college.

Their initial problem was to construct a valid data base. They encountered numerous difficulties,[24] and their various proposals were repeatedly challenged by the defendant's experts, who began to construct their own data base. As the months progressed and the parties tried to resolve their disagreements about the data, the plaintiffs' experts issued a number of versions of what

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[23] Indeed, in the social sciences the two standard deviation test is viewed as the minimum test that must be met to show statistical significance, and there are many who contend that the three standard deviation test is more appropriate.

[24] It should be noted that not only the salary figures of each faculty member but also the size and composition of the faculty changed every year. Moreover, the faculty salaries that were used were base salaries and did not include monies paid as supplements for the generation of private practice by the members of some departments.

they thought the data base should be. Ultimately, however, they adopted the defendant's proposal almost in toto.[25] The two exceptions to this strategy were (1) the inclusion of a few faculty members who had been excluded by the defendant's experts,[26] and the substitution of their own data for the years preceding the academic year 1974-75.

Difficult as the data base problem was, it was insignificant in comparison to the problem of identifying the appropriate variables to be included in the regression analysis. The plaintiffs' experts were using a multiple linear regression to explain the variation between male and female salaries in terms of two components: an explanatory component (a linear function of a set of available, observable explanatory factors, called "variables") and an error component, which represented departures from the explanatory component due to unknown causes or random disturbances. The sex coefficient in the plaintiffs' multiple linear regression model purportedly reflected the differences in the annual average base salaries of male and female faculty members, while holding constant certain independent variables. The multiple linear regression model was intended to mimic, by statistical formula, the variety of factors which determined salary at Einstein. According to the plaintiffs' theory of labor markets (a general theory about the relationship between pay, the productivity characteristics of employees, and the nonpecuniary characteristics of particular jobs), any differences between the salaries of men and women that were not explained by the pertinent variables to be used in the model had to be the result of sex discrimination. Unfortunately, however, their theory of labor markets did not identify which variables had to be used in the model if it were to accurately and reliably explain the causes of any discovered salary differentials.[27]

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[25] Unfortunately, despite the parties' apparent pretrial resolution of their differences, the Court was nevertheless called upon during the trial to decide several issues concerning which data should be used.

[26] The plaintiffs' report ultimately included three chairpersons and a number of deans whom the plaintiffs had intended to exclude.

[27] The inclusion of proper variables and the exclusion of improper variables is referred to as the proper specification of the model.

The defendant's equally prominent experts, three of whom were associated with Columbia University, used a number of variables different from those originally used by the plaintiffs' experts. Interestingly, when the latter received the defendant's initial report, they decided to add to their rebuttal report some, but by no means all, of the defendant's data and variables.[28] Much later, in the plaintiffs' experts' fourth and final report (the only one offered in evidence), they presented two sets of tables, one of which omitted four variables that the defendant's experts considered critical and the other of which included those variables.[29] In the opinion of the defendant's experts, however, even this second table omitted several relevant variables and included other variables which were unnecessary and, in some cases, misleading.[30]

In their multiple linear regressions, the plaintiffs' experts analyzed the salaries of class members and of their male colleagues for the years 1969 to 1979 (and thus covered several years prior to the relevant time period). After determining for each year the raw difference between the average salary of

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[28] Indeed, Dr. Ashenfelter later testified that certain of the variables that were employed by the defendant's experts and originally omitted from his reports are widely used in the theory of labor markets that he adopted.

[29] The variables which were included in the second set of tables but not in the first were: 1) major administrative responsibilities which were undertaken prior to the relevant time period but performed during that period; 2) a faculty member's clinical or reserach emphasis; 3) faculty rank; and 4) time in faculty rank.

[30] For example, one of the variables included by the plaintiffs was whether a medical degree was earned from a domestic or foreign medical school. As the defendant pointed out, the range in the quality and reputation of various foreign medical schools is tremendous. Some of these schools, such as McGill University in Canada, the University of Edinburgh in Scotland, and the University of Dublin in Ireland, are considered to be at least the equals of American medical schools. Other schools, including those found in non-English speaking countries and particularly those in developing nations, are not considered comparable. Consequently, the differentiation between domestic and foreign medical schools is not in itself meaningful.

female faculty members and that of male faculty members, the experts calculated an annual adjusted salary coefficient, or "sex coefficient." This sex coefficient represented that part of the total difference in salaries which, because it was not attributable to any of the explanatory variables, might be attributable to sexual discrimination. By means of these calculations the plaintiffs' experts determined to their satisfaction that the salary differences disfavoring women were statistically significant (at the 0.05, or two standard deviation, level) for the year 1970 and the years 1973 through 1978.[31] The plaintiffs also separately analyzed the differences between the salaries of full-time faculty members hired prior to March 24, 1972 (when Title VII became applicable to universities) and those hired thereafter. The overall conclusion of the plaintiffs' experts was that, at least with respect to faculty members hired before March 24, 1972, the average salary of the class members during the relevant time period was discriminatorily lower than that of their male colleagues and that the gross disparity in salaries increased with the passage of time.

C. *Defendant's Statistical Analysis and Critique of Plaintiffs' Statistics*

For a number of reasons, the defendant's experts did not agree with the conclusions of the plaintiffs' experts. First, from the broadest perspective, the defendant's experts noted that a multiple linear regression is best used where there is experimental control of the explanatory factors, replicability of observations, and randomization of experimental material of close comparison groups to eliminate systematic bias. The model must be properly specified, and the errors must be random and statistically independent of each other and of any explanatory variables. Moreover, the errors must be normally distributed with a zero

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[31] It should be noted at this point that a similarity of results over a number of years adds little to the significance of any one year's results where, as here, the persons under consideration, the system of guideline increments, and the salaries change relatively little from year to year and any changes are for the most part symmetrical. Indeed, as the defendant noted, the comparative differentiation from year to year in the plaintiffs' results, if anything, indicated a lack of consistency and verifiability in the plaintiffs' model.

mean and constant variance. The defendant noted that most of these requirements were not met by the plaintiffs' model.

Second, as indicated earlier, the defendant disputed some aspects of the data base used by the plaintiffs. The defendant concluded that if one used an accurate data base, such as that which the defendant eventually adopted, but still retained the plaintiffs' variables, salary discrimination at a statistically significant level could be shown in only three years — 1974, 1975, and 1978.

Third, the defendant argued that the use of a logarithmic form of salary as the dependent variable would stabilize the scatter of residuals and provide a more accurate approximation for the assumptions underlying the multiple linear regression model. The defendant pointed out that when this was done and the appropriate data base was used, the disparity in salaries was statistically significant in only one year, 1975. Furthermore, if just some of the defendant's disputed variables were also added, the level of significance for that year decreased to exactly two standard deviations. Finally, the defendant contended when all of its variables and none of the plaintiffs' disputed variables were used, there was no year for which salary discrimination at a statistically significant level could be demonstrated.

A summary of the defendant's major points is amply illustrated by the six tables below, which are drawn from exhibit 752 L-1 and which cover only those years that are relevant to this action, 1974 through 1979. The defendant has incorporated the plaintiffs' idea of comparing figures for all faculty hired, regardless of the date of employment (Tables 1 and 2), with those of faculty hired prior to 1972 (Tables 3 and 4) and those of faculty hired thereafter (Tables 5 and 6). Within each of these three pairs of tables, the first (or odd-numbered) table uses only the plaintiffs' variables and the second (or even-numbered) table uses certain of the defendant's variables, *see supra* note 29 and accompanying text, as well as those of the plaintiff.

Each of the six tables gives, first, results based upon the plaintiffs' data base and, then, results based on the agreed upon corrected data base. The columns in each table delineate: (1) the

year, (2) the sexual coefficient of salary in dollars , (3) the sexual coefficient of the logarithim of salary, (4) a student "t" level of significance for each coefficient,[32] and (5) the number ("n") of persons included in each year for each data base. In addition, an asterisk is used to highlight any salary disparity of statistical significance at or above the level of two standard deviations.

[32] A student t is a statistic concerning the sample standard deviation, as opposed to the population standard deviation. It is a test of the validity of statistics that are drawn from a limited sample. P. Moel & R. Jessen, Basic Statistics for Business and Economics, 187-90 (2d ed. 1977).

HIRED ANYTIME

Table 1

(Only Plaintiffs' Variables)

	Plaintiff's Data					Agreed Data				
Year	Sex Coef	t	Log Sex Coef	t	n	Sex Coef	t	Log Sex Coef	t	n
1974	-2378	-2.13*	-.07	-2.12*	282	-2073	-1.98	-.057	-1.89	287
1975	-2586	-2.26*	-.07	-2.27*	300	-2588	-2.38*	-.070	-2.46*	295
1976	-2532	-2.15*	-.06	-2.15*	261	-2070	-1.80	-.048	-1.53	252
1977	-2999	-2.12*	-.06	-1.70	223	-2226	-1.65	-.044	-1.32	207
1978	-3145	-2.18*	-.05	-1.47	220	-2965	-2.14*	-.053	-1.59	204
1979	-2422	-1.81	-.04	-1.23	216	-2410	-1.89	-.041	-1.60	209

*Statistical significance of 2 standard deviations or more.

Table 2

(Plaintiffs' and Some of Defendant's Variables)

	Plaintiff's Data					Agreed Data				
Year	Sex Coef	t	Log Sex Coef	t	n	Sex Coef	t	Log Sex Coef	t	n
1974	-1284	-1.32	-.04	-1.38	282	-1105	-1.20	-.033	-1.22	287
1975	-1549	-1.54	-.04	-1.54	300	-1723	-1.83	-.050	-2.00*	295
1976	-1814	-1.88	-.04	-1.91	261	-1750	-1.80	-.042	-1.54	252
1977	-2620	-2.22*	-0.05	-1.63	223	-2129	-1.90	-.042	-1.50	207
1978	-2402	-1.96	-.03	-1.10	220	-2210	-1.92	-.038	-1.39	204
1979	-1783	-1.55	-.02	-0.93	216	-1861	-1.64	-.033	-1.45	209

*Statistical significance of 2 standard deviations or more.

HIRED PRIOR TO 1972

Table 3

(Only Plaintiffs' Variables)

	Plaintiff's Data					Agreed Data				
Year	Sex Coef	t	Log Sex Coef	t	n	Sex Coef	t	Log Sex Coef	t	n
1974	-4295	-2.77*	-.12	-2.93*	192	-4166	-2.74*	-.114	-2.89*	189
1975	-3742	-2.11*	-.10	-2.50*	187	-3706	-2.17*	-.105	-2.54*	179
1976	-4000	-1.98	-.10	-2.24*	155	-4179	-2.31*	-.110	-2.58*	143
1977	-5916	-2.39*	-.14	-2.57*	128	-5291	-2.24*	-.132	-2.47*	119
1978	-7077	-2.83*	-.14	-2.84*	111	-6450	-2.64*	-.134	-2.61*	104
1979	-8686	-2.79*	-.18	-3.21*	100	-6528	-2.27*	-.135	-2.60*	100

*Statistical significance of 2 standard deviations or more.

Table 4

(Plaintiffs' and Some of Defendant's Variables)

	Plaintiff's Data					Agreed Data				
Year	Sex Coef	t	Log Sex Coef	t	n	Sex Coef	t	Log Sex Coef	t	n
1974	-2338	-1.73	-.06	-1.87	192	-2054	-1.59	-.059	-1.75	189
1975	-2445	-1.53	-.07	-1.87	187	-2252	-1.51	-.067	-1.87	179
1976	-2666	-1.58	-.07	-1.81	155	-3026	-2.01*	-.079	-2.28*	143
1977	-4302	-2.14*	-.10	-2.33*	128	-4068	-2.06*	-.101	-2.34*	119
1978	-4597	-2.08*	-.09	-2.03*	111	-4117	-1.86	-.082	-1.77	104
1979	-6288	-2.09*	-.13	-2.40*	100	-5000	-1.68	-.101	-1.89	100

*Statistical significance of 2 standard deviations or more.

HIRED SUBSEQUENT TO 1972

Table 5

(Only Plaintiffs' Variables)

	Plaintiff's Data					Agreed Data				
Year	Sex Coef	t	Log Sex Coef	t	n	Sex Coef	t	Log Sex Coef	t	n
1974	-2796	-1.54	-.12	-1.75	90	-1382	-1.00	-.059	-1.06	98
1975	-3614	-2.63*	-.12	-2.49*	113	-2416	-2.07*	-.085	-2.07*	116
1976	-2767	-2.15*	-.08	-2.12*	106	-1228	-0.89	-.035	-0.71	109
1977	-1124	-0.68	-.02	-0.41	95	- 164	-0.10	·.005	·0.09	88
1978	- 203	-0.12	·.00	·0.09	109	- 817	-0.49	-.025	-0.52	100
1979	· 70	·0.05	-.02	·0.44	116	-1053	-0.82	-.017	-0.54	109

*Statistical significance of 2 standard deviations or more.

Table 6

(Plaintiffs' and Some of Defendant's Variables)

	Plaintiff's Data					Agreed Data				
Year	Sex Coef	t	Log Sex Coef	t	n	Sex Coef	t	Log Sex Coef	t	n
1974	-2497	-1.60	-.10	-1.69	90	-1395	-1.02	-.058	-1.05	98
1975	-2605	-2.02*	-.09	-1.88	113	-2150	-1.98	-.073	-1.94	116
1976	-1424	-1.23	-.04	-1.25	106	-1246	-0.91	-.036	-0.72	109
1977	- 451	-.029	·.00	·0.00	95	· 352	·0.23	·.019	·0.41	88
1978	· 181	·0.12	·.01	·0.20	109	- 31	-0.02	-.012	-0.29	100
1979	- 41	-0.04	·.01	·0.43	116	-1250	-1.18	-.023	-0.87	109

*Statistical significance of 2 standard deviations or more.

D. *Problems With the Plaintiffs' Proof*

The Court concludes that there is substantial merit to the defendant's criticism of the plaintiffs' analyses. The discussion that follows is a detailed outline of the major shortcomings in the plaintiffs' proof.

1. *Unmeasured differences that exist between the various faculty positions that were analyzed.* Initially, it is clear that there was a disparity between the salaries of those in clinical departments and those in pre-clinical departments. The clinicians, who were more directly responsible for the receipt of income through affiliation contracts and from private patients and who, because of their occupations, had greater career opportunities, were clearly favored over the preclinical instructors, whose positions more nearly approximated those of traditional university professors. The higher representation of females in the preclinical fields, thus, was a distorting factor that was not adequately dealt with in the plaintiffs' studies. Moreover, even within the clinical departments, the distinction between those who were primarily researchers and those who primarily engaged in the practice of medicine was not adequately accounted for by the plaintiffs' variables. Nor was the inherent departmental stratification, with its attendant differences in salaries.[33] This alone has been cited as enough to defeat a plaintiff's attempt to establish a prima facie case through statistical evidence. *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 580 (4th Cir.) (failure to analyze salaries department by department or discipline by discipline invalidated plaintiff's proof), *cert. denied*, 434 U.S. 904, 98 S.Ct. 300, 54 L.Ed.2d 190 (1977).

Moreover, although the plaintiffs' regression model attempted to account for specialties, the advanced nature of the faculty at Einstein had resulted in most faculty members being Board-

[33] Although it is true that many of the departments would have been difficult to study separately because they were not large enough, certain of the large departments could have been stratified to eliminate intradepartmental differences, as was done by the defendant's experts in their studies.

certified not only in a specialty but also in a sub-specialty.[34] The evidence indicates that the sub-specialties were a determinant of salary at Einstein because the limited number of persons in some sub-specialties made their services more valuable than the services of those in other sub-specialties.

2. *Unmeasured effect of individual productivity on salary.* Although the parties disagreed somewhat about which variables adequately reflected the major factors influencing hiring decisions, their major dispute concerned which variables, if any, should be included to measure productivity during the term of employment. The parties agreed that once faculty members were hired, their progress thereafter was largely determined by their productivity as faculty members. They also agreed that productivity was typically measured by considering such factors as quality of research, quality of teaching, quality and quantity of clinical work, number and significance of publications, reputation, generation of private practice, development of an important clinical process, procurement or administration of a major grant, any offer of employment from a competing college, mobility, significance of any contributions to science, and, more generally, the manner in which a faculty member spent his or her time.

Unquestionably, these are difficult considerations to quantify and include in the form of one or more variables. Only one of these factors, a faculty member's rate of publication, was easily measurable;[35] yet, this variable is a flawed indicator of productivity for several reasons. First, researchers had greater opportunity to publish than did clinicians. Second, the data base

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[34] To explain their exclusion of sub-specialties, the plaintiffs noted the restriction on the number of variables that could be included in their model and, in addition, argued that the great number of sub-specialties that are not Board-certified offset the value of accounting for any of the sub-specialties.

[35] With respect to other factors which might have been easily measurable at another college, only limited information about the procurement of grants was available here (only data concerning grants of more than $100,000 from the National Institutes of Health and the American Cancer Society), and whatever data regarding private practice that was collectible would have had little value because of the already noted differences in how the various departments treated such service, *see supra* note 13.

was not complete for this purpose because it was based on faculty members' resumes which were not always current and in some instances included only those works that had been published before the date of initial employment. (As a consequence of this second problem, the publication variable reflected a "rate" of publication rather than an absolute number of publications.) Finally, as the defendant contended, the publication variable did not take into account the difference between significant and insignificant publications.

In light of these limitations, the plaintiffs' experts attempted to account for productivity by using proxies. The defendant, however, convincingly argued that the proxies failed to adequately account for the true productivity differences and that the consequential underadjustment for these differences resulted in an overestimate of the sex coefficients.

The evidence was clear that certain types of productivity, such as the procurement and management of large research grants, clinical expertise, the generation of revenue through private practice and affiliation practice, and a significant clinical work load, had a direct affect upon compensation and should have been accounted for as significant sources of productivity differences. In addition, it was necessary to take account of the less tangible but highly important factor of the quality of performance in the areas of research, teaching, and clinical practice. Although these factors were not easily quantifiable, we cannot conclude that their omission had no effect on the results of the multiple linear regression study. On the contrary, the fact that male faculty members scored higher on sixteen of the plaintiffs' twenty proxies strongly suggests that the omission of the less tangible factors distorted the results in favor of the plaintiffs. The Court agrees, therefore, with the defendant's conclusion that the failure to adequately account for productivity resulted in an underadjustment bias and plaintiffs' overstatement of the sex coefficients.

To avoid this inadequacy in the plaintiffs' analysis, the defendant turned to faculty rank as a more appropriate indicator of productivity differences. The defendant believed that rank was one of the most important explanatory factors and that it played

a role in the determination of salary beyond that of the promotion increase itself.

The plaintiffs, however, objected to the use of rank as a surrogate for productivity on two grounds. First, they argued that rank was not a truly independent variable. While this contention is partially true in that some of the factors considered in determining salary increases are the same factors that are considered in the determination of promotions, it ignores the more important point that promotion is based largely on the more intangible and less quantifiable indicators of productivity that are not factors affecting the annual salary increases.

Second, the plaintiffs argued that because the same sort of bias that might affect salary decisions might also affect the subjective evaluations preceding a faculty member's promotion, academic rank should have been included as an explanatory variable only where there was clear evidence that neutral and objective standards had consistently been followed and there was no chance that the decisions regarding rank had been affected by sexual discrimination. *See*, Finkelstein, *The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases*, 80 Colum.L.Rev. 737, 741-42 (1980). Having heard substantial evidence on this very point, the Court, however, is convinced that promotions in rank, which were handled by independent faculty committees, were in fact based on merit and were not contaminated by elements of sexual discrimination.[36] Moreover, rank appears to be the only available surrogate for the productivity variables that cannot be quantified in any other manner. Although rank does not completely reflect such amorphous considerations as the quality of research and teaching, clinical expertise, and reputation, it is the only available variable that seems to give any weight to these important factors.[37]

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[36] Indeed, although the plaintiffs initially alleged that the promotion process itself was sexually discriminatory, they eventually abandoned that claim.

[37] Faculty rank can act as a surrogate only for persons who have not become full professors. For those who have reached that highest level, the possibility of increasing faculty rank does not exist.

Because variations in promotions in rank contributed substantially to salary differences, the exclusion of rank as a variable could easily result in statistically significant sex coefficients even in the absence of discriminatory salary and promotion decisions. Thus, a statistical study that omitted this most important determinant of differences in salaries would be insufficient to support a finding of discrimination. *See, e.g., Presseisen v. Swarthmore College*, 442 F.Supp. 593, 614 (E.D.Pa. 1977), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978). Such an omission is more likely to lead to erroneous findings of discrimination in professional settings, where women are quite recent entrants into the field and the criteria for pay and promotion are more complex and less readily quantifiable, than it is in industrial settings, where productivity is more easily measured and women have worked for years. The Court concludes, therefore, that rank is an appropriate variable to be used in a multiple regression study.

When the defendant introduced rank into the plaintiffs' studies, the degree of apparent sex discrimination diminished substantially. Indeed, when faculty rank was added to the plaintiffs' preferred model, the sex coefficient and student t values diminished so much that statistically significant salary disparities appeared in only one year, 1975.

3. *Other technical shortcomings in the plaintiffs' analysis.* In addition to not adequately accounting for certain differences in faculty position and productivity,[38] the plaintiffs' study suffered from other technical difficulties. First, the study included some variables which were of no particular relevance, for example, whether or not someone had obtained an advanced degree other than an M.D. Obviously, some types of additional education might have been valuable to Einstein, but this would not have been the case if the degree earned were in classical Italian architecture; nor could the holder of such a degree have expected it to prompt the college to award a salary increase.

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[38] A similar, albeit lesser, shortcoming was plaintiffs' exclusion of the factors of time in faculty rank and level of administrative responsibility, which also had a substantial bearing upon salary.

Second, the plaintiffs' attempt to control for experience through the use of approximately fourteen variables was not at all effective. Many of the variables — the total of prior experience squared, age, age squared, total medical experience, job tenure at Einstein, and job tenure squared — were patently collinear, which simply means they tended to measure the same thing. The absence of proper measures of experience and the presence of multi-collinearity created a multiple linear regression that was misspecified and unreliable. *See Wilkins v. University of Houston*, 654 F.2d 388, 404-05 & n.21 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982). This was demonstrated by the susceptibility of the sex coefficients to large variations when only small changes in data were made, such as the addition or exclusion of a single person. In one instance, the removal of a single faculty member from the data base lowered the relevant sex coefficient from $2,378 to $1,957, and the corresponding level of statistical significance from 2.13 to 1.77.

A third technical problem was that three widely used indicators of the accuracy of statistical models strongly suggested that the plaintiffs' model was unreliable. One, the adjusted R^2,[39] measures the accuracy of a multiple linear regression. The R^2 values, in this case, were better when the defendant's variables were used in the model than when the plaintiffs' preferred variables were used. The second indicator, the standard error of the regression, was employed to evaluate the accuracy with which the multiple linear regression model estimated the differences in salary attributable to differences in sex. (With this indicator, the smaller the standard error, the more reliable the conclusions.) The standard errors in the plaintiffs' tables for all employees, regardless of when hired, were unacceptably large. Finally, the unreliability of the model was also indicated by the fact that the random changes in the signs and amounts of the coefficients from year to year could not be explained by any changes in Einstein's policies.

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[39] R^2 is the coefficient of determination: it "indicates the proportion of total variance in the dependent variable that is explained by or associated with the group of independent variables in the [regression] equation." D. Baldus & J. Cole, Statistical Proof of Discrimination, § 8.123[1], at 259 (1980).

The last technical flaw that must be noted is the plaintiffs' failure to validate their model. They demonstrated neither that their variables were entered in the correct functional form nor that the assumptions necessary for the model's use had been satisfied, particularly the assumption of an additive relationship between the effects of independent variables. Furthermore, the plaintiffs provided insufficient evidence that the errors in their model were not correlated with the explanatory variables, were independent of one another or had a zero expectation, and had a constant variance or normal distribution.

Faced with these many shortcomings, the Court has no alternative but to find the plaintiffs' model technically inadequate. Although the plaintiffs correctly argued that, in order to make out a prima facie case, they were not required to produce a perfectly designed or specified model, but rather one that only roughly controlled for the necessary considerations, the plaintiffs failed to produce a model that met even this lesser standard. For example, residual plots of the plaintiffs' model revealed an unacceptable increase in the scatter as the salaries increased, yet the plaintiffs' experts failed to control this problem by using the logarithmic form of salary, as the defendant's experts recommended. Such a failure is hard to accept. So too is it difficult to accept the failure to account for the underadjustment bias in the plaintiffs' model, which, as was discussed earlier, resulted from the plaintiffs' use of inadequate proxies for productivity. As the defendant later demonstrated, almost the entire average sex coefficient in the plaintiffs' preferred model could have been explained by the underadjustment bias attributable to the use of those proxies. The serious doubts that are raised by this flaw and the others already discussed convince the Court that the plaintiffs have failed to sustain their burden of proof by producing a valid and reliable model.[40]

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[40] At the very conclusion of the plaintiffs' rebuttal, they attempted to introduce still another study to deal with some of the problems of their earlier models. This study contained inaccurate data, was cumulative of their earlier submissions, and did not affect their experts' opinions. Moreover, in the opinion of the Court, the study did not address the major criticisms raised by the defendant's experts. The Court declined to accept this rebuttal report

(footnote continued)

4. *Failure to consider the effect of pre-Act discrimination on later salaries.* In the initial stages of litigation, the plaintiffs' regression study was not designed to analyze the extent to which salary differentials may have been the consequence of discriminatory acts that occurred prior to the date that Title VII became applicable to universities. When the plaintiffs' experts later performed such an analysis, they acknowledged that it revealed no statistically significant proof of sexual discrimination during the relevant time period. Nor was there any statistically significant evidence of discrimination in salary increases on a year-to-year basis. Indeed, the plaintiffs' expert, Dr. Ashenfelter, testified that both the plaintiffs' and defendant's statistical studies indicated that men and women have generally been treated the same during the relevant time period. Dr. Ashenfelter concluded that, under his theory of labor markets, the appearance of discrimination in salaries during the relevant time period resulted from lower salaries paid to female faculty members who had been hired prior to 1972. He added that with respect to female faculty members hired after March 24, 1972 (the effective date of Title VII), there was an absence of any statistical significance in salary differences. This situation is similar to that found in *Gilinsky v. Columbia University*, 488 F.Supp. 1309 (S.D.N.Y. 1980), *aff'd*, 652 F.2d 53 (2d Cir. 1981), where Judge Lasker, after noting that prior to 1972 Columbia University " 'was free, as far as Title VII was concerned, to discriminate in its employment practices,' " determined that "the probative value of pre-1972 statistics is at best minimal" and, accordingly, dismissed the action because it was based largely on such cumulative statistics. *Id.* at 1313 (quoting *Weise v. Syracuse University*, 522 F.2d 397, 410 (2d Cir. 1975)).

The absence of discriminatory treatment during the relevant time period was suggested by the defendant's study as well.[41]

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because of its untimely submission to the defendant's experts, who requested two additional weeks of trial in order to study and respond to it, and because of its almost complete lack of probative value.

[41] The defendant presented a total of four experts: (1) Dr. Herbert Robbins, former chairperson of the Department of Mathematical Statistics at Columbia University; (2) Dr. Bruce Levin, a statistician with expertise in the

(footnote continued)

The defendant employed an "urn" model, believing it to be more appropriate than the standard multiple regression model.[42] In addition, the defendant separately analyzed initial salaries and each year's salary increases.[43] It also separately studied seven large departments and added a factor to differentiate between clinical and preclinical departments.[44] By these methods, the defendant was able to avoid some of the problems inherent in the plaintiffs' model.[45]

The defendant's studies of initial salaries for those hired during the relevant time period and for pay increases during that period showed no pattern or practice of male-female salary differentials. The defendant's studies stratified departments where

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application of multiple linear regression to categorical data; (3) Dr. Frank Sloan, an econometrician specializing in public health, particularly the compensation of physicians; and (4) Dr. Frederick Putney, principle administrator of the Columbia University School of Public Health, including the College of Physicians and Surgeons. The Court found Dr. Putney to be particularly knowledgeable and persuasive.

[42] The urn model allowed the defendants to test for the significance of any difference in the average salaries of males and females by comparing that difference with the difference obtained by randomly dividing all the salaries into two groups (and thus simulating a clearly non-discriminatory distribution of salaries). The advantage of the urn model was that the validity of its use did not depend on the same underlying assumptions upon which the plaintiffs' model rested, and which were so much in doubt. Hence, although perhaps not as statistically powerful as the multiple linear regression model, the urn model provided a very appropriate test given Einstein's complex organization and the diffuse factors affecting salaries.

[43] It should be noted that proceeding on the separate year basis avoided the distorting effect of interdependent variables which resulted from analyzing total salary in consecutive years as plaintiffs' experts did. The defendant's experts used the urn model tests in their study of initial salaries and an analysis of residuals in their study of subsequent annual pay increases.

[44] As indicated earlier, it was impossible to study all departments separately since some were not large enough. In addition, the number of women present in certain departments was so small that no valuable comparison could be made.

[45] Nonetheless, certain of the difficulties in making a complete study remained.

possible, took into account sub-specialties as well as rank, time in rank, major administrative responsibilities, clinical research emphasis, and other factors which, this Court believes, were determinants of salary at Einstein and, thus, proper variables. With the incorporation of these variables, the analyses indicated that the proportion of male faculty members receiving more than the expected initial salary was slightly greater than the proportion of female faculty members receiving that level of compensation. The difference, however, was less than one standard deviation and, thus, of no legal significance.

The study of the yearly pay increases under the guidelines was particularly persuasive. The defendant's study first took the salary of each faculty member for a given year and then added to it that year's guideline increment to obtain a projected salary. The projected salary for each faculty member was then deducted from his or her actual salary to determine a salary residual for that year. This was done for each year during the relevant time period and for each faculty member. The difference between the average residual of men and the average residual of women was considered the unexplained portion of the gross disparity. The size and statistical significance of this difference was used as a test for the presence of discrimination in yearly pay increases.[46] The analysis of average salary residuals (without adjustment for promotions) showed that in three out of the five years during the relevant time period, the difference favored women. In none of the years were the differences statistically significant at the .05 level. Indeed, the proportion of women who received above-guideline increases was higher than that of men (though not at a level of statistical significance). Even when an adjustment for promotions was made, women appeared to be favored in three of the five relevant years and, again, no statistically significant differences were revealed.[47]

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[46] For these purposes a "z score" was used rather than a student t value, *see supra* n.32. These two statistics, however, serve the same functions, and a z score of less than 2.0, for example, denotes the same low level of statistical significance that a similar t value indicates.

[47] In each year in the relevant time period, between half and two-thirds of all faculty members received the guideline increment or within $100 of that amount.

Average summary residuals were also calculated. These represented the difference between a faculty member's actual average yearly salary and the average yearly amount projected for that faculty member. Again, no statistically significant difference was shown. Indeed, a woman's average yearly earnings tended to be slightly larger than those of a man who started at the same initial salary and in the same academic year.

5. *Absence of anecdotal evidence of any probative value.* The anecdotal evidence, or, more accurately, the lack thereof, reflected the same absence of sexual discrimination that was suggested by the defendant's statistical evidence. The only general evidence of an anecdotal nature that had any significance was the fact that during 1972, the year that Title VII became applicable to universities, a faculty senate committee at Einstein appointed a sub-committee to investigate the existence of sex discrimination in pay.[48] The sub-committee prepared a report which included a review of the gross salary levels of male and female faculty members. The sub-committee, which was known as the Senate Committee on Women's Rights, after reviewing limited and incomplete salary information, wrote a report which, among other things, suggested that the mean salary of Einstein's female faculty members was approximately fifteen percent lower than that of their male colleagues. This report was distributed to members of the faculty senate. Some faculty members were of the personal belief that female professors at Einstein (as well as at other institutions and in society in general) were being paid lower salaries because of their sex.

Although the evidence of subsequent actions was somewhat vague, it suggested that some efforts were made, starting in 1972, to compensate female faculty for prior inadequate salaries. In fact, prior to the 1974-75 academic year (the first year of the relevant time period), a task force on fiscal stability, while recommending to the Dean that inequities in salary, particularly those between males and females, continue to be reduced, noted that

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[48] The Senate at Einstein was comprised of elected faculty representatives of all departments, several student representatives, all departmental chairpersons as statutory members, the Dean and certain associate deans. The Dean also chaired the Senate Council, which was elected by the Senate.

much had already been accomplished in the prior year's budget. The Court finds it reasonable to conclude from this evidence that the consequence of the faculty senate report and the new applicability of Title VII to universities was that a conscious effort was made after 1972 to avoid any sex discrimination in salaries.[49]

The anecdotal testimony relating to individual female faculty members was also sparse, and most of it concerned matters predating the statute of limitations date of December 20, 1974. Such evidence is, thus, entitled to little weight and constitute only relevant background evidence. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977).

The only individual class member who testified concerning alleged pay discrimination against her was the first named plaintiff, Edna H. Sobel. She is a full-time faculty member in the Department of Pediatrics who was hired long before March 24, 1972. Indeed, she has been a member of the faculty at Einstein since 1956. She is a Board-certified pediatrician with a sub-specialty in pediatric endocrinology.[50] Dr. Sobel has been responsible for a relatively small division of pediatric endocrinology at one of Einstein's campuses since she joined the faculty and has been a recognized authority in her field for some years.

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[49] Little evidence was offered to establish how women were discriminated against in the years prior to 1972. However, a few facts emerged from which some tentative conclusions can be drawn. During the late 1960's and early 1970's, Einstein was in difficult financial straits caused, at least in part, by the opening of its own hospital in the Bronx at a time when the need for a new hospital was not economically apparent. Consequently, it appears that most of Einstein's faculty members were not paid what they were worth. Raises tended to go only to those who made a great fuss about the failure to receive an adequate salary. In most instances, those who protested were men who were the sole sources of income for their families. (Although no statistics were presented on this matter, we take it as an accepted sociological fact that the percentage of men who were the sole wage earners for families with children exceeded the percentage of married women who were such.) This tendency to favor the sole working members of families appears to have disappeared in the 1970's as circumstances changed.

[50] She is not Board-certified in her sub-specialty, but the boards for that sub-specialty have only been in existence for a few years.

When Dr. Sobel joined Einstein's faculty in 1956, she started as an assistant professor. In 1960, she was promoted to the rank of associate professor and in 1968, to the rank of full professor. Throughout her career she has had a broad range of responsibilities in teaching, research, and patient care. During the late 1960's and early 1970's, she received some research funds; however, she has not received any grant money since 1976.

In 1970, Dr. Sobel complained to her department chairperson, Dr. Lewis Fraad, that her salary was too low. He was inclined to agree with her and knew that other professors in the department believed that her low salary at that time may have been related to her sex. In 1972, she was recommended for and received an above-guideline salary increase. In 1973, she sought another above-guideline salary increase. Dr. Fraad noted that she had earned $7,000 of private practice income at the college hospital which was not being included in her base salary. Nonetheless, although he did not necessarily believe that she was underpaid at that time, he again recommended her for an above-guideline increase for the 1973-74 academic year. She again received one, although it was less than that which was requested.

In the following academic year, Einstein appointed a new department chairperson, Dr. Chester Edelmann, who remained the chairperson throughout the relevant time period. Dr. Sobel received no above-guideline increases thereafter, though she did receive the guideline increase every year. The defendant attributed Dr. Sobel's failure to garner larger increases to two factors. First, Dr. Edlemann was not completely satisfied with Dr. Sobel's teaching methods in small groups. (There were also overtones of a personality conflict between Dr. Sobel and Dr. Edlemann.) Second, she was hurt by her failure to generate much additional revenue for Einstein either from research grants or patient treatment. In fact, her laboratory research program had to be discontinued because of her inability to secure research grant suppport.[51]

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[51] During this period, she did not receive encouraging comments about her research proposals from the National Institutes of Health and others who might have provided grants.

Dr. Sobel, thus, failed to establish that she had been discriminated against on the basis of sex during the relevant time period. She did not even introduce any evidence of the compensation of similarly situated male faculty. In essence, her case reduced to the claim that her salary had been discriminatorily low prior to 1974 and that she should have been granted additional above-guideline increases to remedy the earlier discrimination.

The other named plaintiff, Dr. Bella C. Clutario, did not take the stand at trial. In fact, no evidence whatsoever was offered concerning her claim of discrimination.[52]

There was, therefore, none of the direct evidence of discrimination with respect to any particular class member that might have provided an acceptable means of proving discrimination in a case of this nature.[53] *Cf. McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973)(where plaintiff did present the type of evidence needed to establish a prima facie case of discriminatory hiring). It seems reasonable to assume that, if there had been classwide discrimination, the plaintiffs should have been able to demonstrate some instances of discrimination against individuals. The absence of any such anecdotal evidence casts considerable doubt on the plaintiffs' claims. This is particularly true in a case such as this where discovery was undertaken over a seven-year period, with all of the resources of the EEOC available for the last several years.

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[52] Although the issues of liability and damages were bifurcated, the Court's order of March 4, 1982 directed that the named plaintiffs would be required to testify and prove their particular damage claims during the liability portion of the trial. This requirement was imposed to give both parties the opportunity to prove the existence or nonexistence of individual damages at least to the extent that such evidence might prove or disprove any liability for sex discrimination in salaries.

[53] Although the plaintiffs did note that four of the class members had requested above-guideline increases during the relevant time period, no evidence was offered to establish that previous discriminatory treatment on the part of the defendant caused a need for such increases.

Indeed, given the available evidence, the Court finds it extremely unlikely that the defendant would have even tried to discriminate against the class during the relevant time period. Title VII had been passed and made applicable to the university. The faculty senate committee had indicated an awareness of a prior problem. The social trend of the times was strongly contrary to employment discrimination against females. The metropolitan area in which Einstein is located provided a substantial market for physicians who were unhappy with their college salary. In addition, there were five other medical schools in the area and 125 medical schools in the country. Having highly marketable skills, these women were not at the mercy of the employer in the manner that an untrained person might be. Finally, since salary increases were largely the product of the recommendations of departmental chairpersons, any instance of sex discrimination would almost certainly have been the product of a particular chairperson's bias rather than that of any university or college policy.

The Court concludes, therefore, that the plaintiffs have failed to prove a prima facie case of disparate treatment with respect to salary. They have failed to carry their burden of persuasion for both the individual and the class claims.

6. *Untimeliness and inadequacy of plaintiffs' disparate impact claim.* When the plaintiffs recognized the factual weakness of their disparate treatment case midway through the trial, they switched, in part, to a claim of disparate impact. They argued that there was sufficient evidence from which to conclude that, largely because of the guideline increment system, the salaries of at least those female faculty members who were hired before March 24, 1972, were discriminatorily lower than those of male faculty members hired before that date, when Title VII first became applicable to universities. Although the plaintiffs conceded that the annual guideline increment system was neutral on its face, they claimed that it was discriminatory in operation, at least to the extent that it perpetuated the effects of pre-Act discrimination.[54]

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[54] It is still not clear that the plaintiffs have any real objection to the guideline system itself: if they were simply granted a one-time adjustment to make the

(footnote continued)

Unfortunately for the plaintiffs, their disparate impact claim fails on two completely independent grounds. First, the plaintiffs' last-minute, mid-trial switch to an alternate theory must be rejected on the procedural ground of unfairness to the defendant. For seven years prior to the trial and throughout much of the trial itself, the defendant was confronted solely with a claim of disparate treatment. Much of the Court's purpose in permitting the parties so much time to prepare this case was to ensure full and fair discovery and complete development of all the legal issues that might arise at trial. Thus, to allow the plaintiffs to adopt a completely different theory of liability at such a late date, particularly when in the years preceding the trial they gave little if any indication that they were claiming disparate impact, would be to work a gross injustice on the defendant.[55] *See Presseisen v. Swarthmore College*, *supra*, 442 F.supp. at 598, 603 (court refused to consider disparate impact claim first raised late in the trial); *cf. Ste. Marie v. Eastern Railroad Ass'n*, 650 F.2d 395, 399 n.2 (2d Cir. 1981)(Friendly, J.)(trial court's imposition of "the more stringent burden applicable in a disparate impact case" implicitly found to be unfair to defendant where both parties had consented to trial on disparate treatment theory and case was, in fact, tried on that theory).

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average of their salaries equal to that of their male counterparts, they would be perfectly content to let the guideline system continue operating just as it has for years.

[55] If the defendant had been given adequate notice, it undoubtedly would have offered additional evidence to support its contention that the guideline system was justified as a "business necessity," *see, e.g., Teamsters v. United States*, 431 U.S. 324, 336 n.15, 97 S.Ct. 1843, 1855 n.15, 52 L.Ed.2d 396 (1977). What proof the defendant did offer tended to show that the system was designed to strike a reasonable balance between two conflicting needs: one for a balanced budget and the other for adequate and equitable salary incentives. That the defendant was thus effectively denied a full opportunity to justify its system, and thereby meet its burden of production and compel the plaintiffs to come up with another, less discriminatory system which also served the apparently legitimate "business" needs already served by the existing system, *see, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977), demonstrates rather clearly the degree of unfairness the plaintiffs have asked this Court to condone.

Furthermore, even without such a procedural bar, the plaintiffs' claim of disparate impact must fail on its merits. In the seminal decision concerning disparate impact theory, *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices." *Id.* at 430, 91 S.Ct. at 853. Since *Griggs*, however, the Court has carefully circumscribed what it meant when it originally made this very broad statement of law. Most significantly for our purposes, the Court held in *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), that any discriminatory act which occurs before the onset of the relevant limitations period cannot be considered an illegal act.

> A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.

Id. at 558, 97 S.Ct. at 1889. Continuing, the Court emphasized the point that a plaintiff must prove a *present* violation, one that occurs within the relevant limitations period, not simply a past violation with ongoing effect. "Respondent emphasizes the fact that she has alleged a *continuing* violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Id.*

Under the reasoning of *Evans*, the critical question here is whether the defendant has committed any act of illegal discrimination since the commencement of the limitations period on December 24, 1974. Particularly instructive in answering this question is a close comparison of the facts of *Evans* with those in this case.

In that case, respondent Evans sought credit for seniority that she had lost in February of 1968 when United terminated her as an employee under its then existing policy of not permitting female flight attendants to be married. Although Evans had been rehired in February of 1972, long after that policy had been discontinued and held illegal (in a case not involving Evans), United treated her for seniority purposes as if she were a new employee, rather than someone who had accrued more than a year of active service before her termination and four years of what was essentially an involuntary leave of absence. Having had informal requests for additional seniority denied, Evans filed a charge with the EEOC in February of 1973, one year after she was rehired. In the action that ensued, she argued that, although it was too late to obtain relief based on the 1968 violation, United had continued to violate her civil rights after the commencement of the 90-day limitations period by repeatedly denying her requests for additional seniority. *Id.* at 554-57, 97 S.Ct. at 1887-88.

The Supreme Court, however, disagreed. It observed that United's policy of not crediting rehirees with seniority for previous years of service had been applied fairly and uniformly to all individuals in Evans's situation, regardless of their sex and regardless of the reasons for their initial departures from United.

> Nothing alleged in the complaint indicates that United's seniority system treats existing female employees differently from existing male employees, or that the failure to credit prior service differentiates in any way between prior service by males and prior service by females. Respondent has failed to allege that United's seniority system differentiates between similarly situated males and females on the basis of sex.

Id. at 557-58, 97 S.Ct. at 1888-89. What the Court perceived was an initial illegal act of discrimination in 1968 and an ongoing, impartially administered seniority system that was in no way discriminatory. Once Evans failed to file a timely charge

in 1968, the initial discrimination forever lost whatever legal consequence it might have had, even though it was given "present effect" by the ongoing seniority rules. *Id.* at 558, 97 S.Ct. at 1889.

In the instant case we find a similar situation except for the fact that the alleged "initial discrimination" here was never illegal in the first place. The original salaries of those hired before March 24, 1972, did not have to meet the standards established under Title VII. Thereafter, increases in salary were determined under the guideline increment system, which, as we have already seen, was neutral both in principal and in operation.[56] Hence, the plaintiffs are placed in the awkward position of arguing that past initial salaries which were allegedly discriminatory but certainly legal, and present annual increases that have been shown to be fair and non-discriminatory somehow add up to a "present violation" of Title VII. Surely, the facts of this case are even more compelling than those of *Evans*, and the reasoning of that case must apply here as well.[57]

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[56] In fact, as was noted earlier, the proof tends to show that efforts were made, as in the case of Dr. Sobel, to correct for past discrimination by making special "inequity" increases. Also, the statistics themselves suggest that the guideline system favored female faculty, if it favored anyone, though not to a statistically significant degree.

[57] Although the plaintiffs rely upon a number of cases which attempt to distinguish *Evans* on the ground that a present violation occurs each time an employer issues paychecks that reflect disparate salaries for men and women, *e.g.*, *Kim v. Coppin State College*, 662 F.2d 1055, 1060-61 (4th Cir. 1981); *Satz v. ITT Financial Corp.*, 619 F.2d 738, 743 (8th Cir. 1980), this Court questions the validity of such a distinction. *Evans* itself involved a claim of disparate pay brought by a present employee. *Evans*, *supra*, 431 U.S. at 555-56 & nn.5 & 7, 97 S.Ct. at 1887-88 & nn.5 & 7; yet, that fact did not lead the Supreme Court to conclude that a present violation had been alleged. Rather, it noted a present effect, looked for a present discriminatory practice that might be perpetuating that effect, and found instead a fair and neutral seniority system. Upon that basis, it concluded that Evans had not proven a present violation. That analysis yielded a similar result in *Farris v. Board of Education of St. Louis*, 576 F.2d 765, 767-68 (8th Cir. 1978) (no violation where there was no suggestion that incremental raises were "in any way dependent

(footnote continued)

Consequently, the Court finds that the plaintiffs' claim of disparate impact fails on the merits, as well as on procedural grounds.

E. *The Pension*

All that remains, therefore, is the plaintiffs' claim that under Yeshiva's pension plan female pensioners received discriminatorily lower monthly payments than did male pensioners. Although this particular claim was not expressly raised in their original EEOC complaints, the Court has concluded that this omission or oversight does not bar the claim at this time. Sobel's and Clutario's original claims were quite broad in scope, covering all the peripheral aspects of their employment. The pension plan has always been considered an integral part of the employment compensation package: it was described as such in the literature provided to new employees and has been treated accordingly by all of the parties throughout the many years of this litigation. It would, therefore, be both unfair and unwarranted to bar the claim at this late date on the procedural ground that the plaintiffs never specifically alleged the claim in their complaint.[58]

The facts relevant to this issue, as adapted from the plaintiffs' unchallenged proposed findings of fact, can be summarized as follows:

(1) Prior to March 24, 1972, Yeshiva entered into a contract with the Prudential Life Insurance Company of America ("Prudential"), which obligated Prudential to provide certain of Yeshiva's employees, including the full-time faculty of Einstein, with a program for deferring a limited portion of their

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upon sex"), and must lead to the same conclusion here as well. After all, as Judge Friendly has noted, an employer's obligation is "to eliminate any current discriminatory practices," not "all vestiges of . . . former gender-based discrimination." *Ste. Marie v. Eastern Railroad Ass'n*, 650 F.2d 395, 404 (2d Cir. 1981).

[58] Moreover, *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), which not only held that pension contributions constitute compensation but also declared that use of sex

(footnote continued)

compensation until after their retirement, when the deferred amount would be repaid in the form of an annuity.

(2) The contract between Yeshiva and Prudential provided a method for the purchase, maintenance and distribution of annuities for the individual benefit of paticipants, and it controlled the operation of the pension benefits program.

(3) Those of Einstein's full-time faculty members who held M.D. degrees were given the option of participating in the pension benefits program.

(4) Approximately eighty percent of Einstein's eligible faculty members chose to participate.

(5) The annual contribution to the pension program for each full-time participant consisted of two parts: first, the participant's contribution, a seven percent deduction from his or her gross salary; and second, Yeshiva's contribution, the equivalent of ten percent of the participant's gross salary. Only Yeshiva's contribution actually constituted additional compensation to the participant.

(6) At all times after March 24, 1972, contributions by Yeshiva and faculty participants were used to purchase annuities at a rate determined by the contract between Yeshiva and Prudential.

(7) All rates that were used in the contract for the determination of the amount of annuities to be purchased on behalf of participants were based on sex-segregated mortality tables.

(8) The amount of annuities that would be purchased for the benefit of each participant was calculated on the employee characteristic of life expectancy which, in turn, was based solely on age and sex.

(9) All factors being equal but for sex, a female participant upon retiring received a lower monthly annuity payment than a similarly situated male.

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segregated mortality tables to determine such contributions constitutes a prima facie case of disparate impact, *id.* at 710-18, 98 S.Ct. at 1376-80, was not decided until three years after the plaintiffs brought this action. They can hardly be faulted for not specifically alleging what, at the time, they had no clearly established legal right to claim.

(10) The pension benefits plan was a "defined contribution" plan.[59]

With these facts in mind, it is worth making a few points very clearly. First, Prudential's actuarial tables were based on the undeniable fact that women, as a group, live longer than men. Second, no one has seriously challenged the proposition that in any computation of either premiums or benefits for a large group, sex and age are the only factors that can readily be relied upon to reflect real differences in the costs that an insurer must bear. Third, Prudential, in recognition of its real costs, determined years ago that the most reasonable step it could take was to make the monthly payments to females less than those to males. Finally, Prudential took this step because it was prevented from doing otherwise by the constraints that are placed upon defined contribution plans, namely: both the employee's and the employer's contributions must be the same for women as they are for men, and the time an individual is vested in the plan also must be the same for men and women. Thus, Prudential determined that, since both sexes were entitled to equal amounts of total benefits at retirement, even though one sex on the average lived longer, the fair way to ensure that equal contributions yielded equal benefits was to award lower monthly benefit payments to that group with the greater longevity.

Despite the factual reasonableness of Prudential's solution to this real problem of how to achieve equal sharing of costs and benefits, the Supreme Court, in *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709-10, 98 S.Ct. 1370,

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[59] A "defined contribution" plan is one for which the formula for the *employer's contribution* is fixed at the outset (e.g., 10% of an employee's salary), so that the exact amount that the employer must contribute in any given year is defined as soon as the employee's salary for that year is established. Such a plan is somewhat different from a "defined benefit" plan, in which the formula for the *employee's benefits* is fixed at the outset (e.g., 3% of the employee's average monthly salary during the last year of employment times the number of years employed), so that the exact amount of the employer's contribution for any given year cannot be calculated until the date of the employee's retirement is known.

1375-76, 55 L.Ed.2d 657 (1978), held, in effect, that such a solution is unconstitutional. The defendant, realizing the impact of *Manhart*, attempted to negotiate with the EEOC a plan that would be both legal and economically viable. The EEOC, however, has been unwilling to render an opinion as to the propriety of any of the defendant's proposed plans. Its reluctance to take a stand on the issue stems partly from the fact that it is in litigation with the defendant and partly from the fact that none of the defendant's proposed plans makes adjustments for persons who are currently retired and receiving annuities under the challenged plan.

Not surprisingly, the courts have been baffled by the problem that *Manhart* has presented. On the one hand, private insurance companies are not willing to pay to women the same monthly benefits for the same premiums that they pay to men, because they know that sound actuarial principles require a real and substantial distinction. On the other hand, *Manhart* held that insurers may not employ group annuity plans that are based on such actuarial assumptions.[60] *Id.* One of the consequences of this conundrum is that, in applying the *Manhart* doctrine, two courts of appeals have recently reached completely different results.

In *Peters v. Wayne State University*, 691 F.2d 235 (6th Cir. 1982), *petition for cert. filed*, — U.S. —, 103 S.Ct. 442, 74 L.Ed.2d 599 (1982), the Sixth Circuit distinguished *Manhart* on the basis of two factual differences:

> In *Manhart* the employer deducted retirement contributions at different rates from employees' paychecks. Because women were required to contribute more than men, women effectively earned less

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[60] The Court has concluded that no legal significance should be attached to two of the distinguishing characteristics of *Manhart* which some might find important, namely: (1) the fact that *Manhart* involved a government annuity program, and (2) the fact that the plan in that case was a "defined benefit" plan rather than a "defined contribution" plan. *See supra* note 59. No persuasive reason has been given for limiting the holding in *Manhart* on the basis of these rather technical distinctions.

> money than men for the same jobs. Women and men employees at Wayne State contribute the same amount to the retirement plan. Consequently they receive equal compensation. Furthermore, in *Manhart* the employer operated the pension fund. The city collected the contributions, managed the accumulated money, and calculated the disbursement rates. Wayne State does not operate the pension fund for its employees. Rather Teachers Annuity, an independent insurance company, manages the accumulated money in the individual accounts and calculates the disbursement rates.

Id. at 240. The Sixth Circuit reasoned that these factual differences [61] were significant because the Supreme Court's "primary concern, that women received smaller pay checks for the same work," was simply not a factor at Wayne State University. *Id.*

The Sixth Circuit continued by rejecting an argument that has also been made by the plaintiffs in the instant action.

> Plaintiffs point out that individual women may not live to the predicted statistical age of death and, therefore, may not recover the full actuarial value of their retirement packages. This argument is equally true for men. After death the total benefits received could be calculated to determine whether a man or a woman has received more money. But because annuity payments must be calculated prior to death, insurers and employers must use the only tools available to calculate payments, mortality tables. Both women and men may not live to the predicted statistical age but both women and men have the *same probability* of living to the predicted statistical age.

Id. at 241. This analysis led the Court of Appeals to the conclusion that, in order to "equalize" the treatment of men and

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[61] The court also pointed out that at Wayne State, as is true at Einstein, the faculty are not required to participate in the pension plan.

women, as the plaintiffs requested, Wayne State would have to contribute more to a woman's retirement fund than to a man's so that the man would, in effect, receive less, immediate compensation. The court simply could not accept such a result. *Id.*

In contrast, in *Spirt v. Teachers Insurance & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982), *petition for cert. filed*, — U.S. —, 103 S.Ct. 371, 74 L.Ed.2d 506 (1982), which involved a mandatory college pension plan,[62] the Second Circuit held that it could "discern no meaningful distinction between the disparate treatment accorded the female employees in *Manhart*, who were required to contribute" more than male employees in order to receive equivalent benefits, and the treatment accorded the female employees involved in *Spirt*, whose contributions equaled those of their male colleagues but whose monthly benefits were smaller. *Id.* at 1061.

Obviously, this Court is compelled to follow *Spirt*, which was decided in this Circuit, rather than *Wayne State*. This is true even though the defendants argue that *Spirt* is twice distinguishable on its facts. The first purported distinction is that Yeshiva's pension plan was optional, while the one involved in *Spirt* was mandatory. Unfortunately, we do not see this as being a meaningful distinction. Yeshiva contributed an amount equal to ten percent of a faculty member's gross salary to the pension plan. To pass up this opportunity was simply not a desirable or sensible alternative for most members of the faculty.

The defendant's second point is that while the insurers involved in *Spirt* were sued and eventually ordered to provide retroactive monetary relief (and the university was merely enjoined from contributing to such a plan), here Prudential was not sued and cannot be considered an employer under Title VII.[63]

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[62] Because the insurers in *Spirt* were organizations created solely for the purpose of assisting teaching institutions to provide retirement benefits and because the university shared in the administrative responsibilities of participation in the fund, the court held that the insurers themselves were "employers" for purposes of Title VII. *Spirt, supra*, 691 F.2d at 1063.

[63] *See supra* note 62.

The problem with this argument, however, is that it appears to go only to the issue of remedies and not to that of liability.

Thus, we are compelled to follow Spirt, even though we have two strong reservations in doing so. Our first reservation arises from the fact that, read literally, *Spirt* bars employers from making any sex-based distinctions in any group policies for their employees. For example, any sex-based difference in either the contributions or the benefits specified under an employer's group life insurance program necessarily constitutes a Title VII violation, though in such a case the discrimination is against males.

Our second reservation has to do with the Second Circuit's rather puzzling treatment of the fact that under the remedy adopted in *Spirt* men as a group received less compensation under the merged gender table than did women. The court disposed of this problem in part by noting that the difference was not significant. *Id.* at 1069 & n.12. However, it follows that if this difference was not significant then the original discrimination, which constituted the subject of the suit, was also insignificant.

More important than this Court's doubts about the long-term validity of the *Spirt* decision, however, is the fact that the Supreme Court has recently granted certiorari in a case involving these very issues, *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, — U.S. —, 103 S.Ct. 205, 74 L.Ed. 2d 164 (1982), and certiorari has been applied for in *Spirt*. Whether the Supreme Court will retreat from its *Manhart* holding or offer some reasonable means of applying it in a nondiscriminatory fashion remains to be seen. In any case, the Court is almost certain to comment upon several types of distribution options which have been offered to avoid a *Manhart* problem.[64] Thus, because the

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[64] In *Norris*, *supra*, 671 F.2d at 332, one of the three benefit options is a lump sum payout at retirement. This was also one of the options that Einstein proposed to the EEOC. As noted earlier, the EEOC refused to take a position on whether such a plan would be a viable solution to the *Manhart* problem.

matter of a proper solution to the pension issue in light of *Manhart* has been a continually troubling one, and because the damage issues have not yet been tried, this Court will defer deciding upon the appropriate remedy in this case until such time as the Supreme Court has decided *Norris*, and, if certiorari is granted, *Spirt*.

IV. CONCLUSION

In accordance with the discussion above, the plaintiffs' claims of pay discrimination are dismissed and final decision is reserved on their pension benefit claims pending further ruling by the Supreme Court.

SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Fourth day of February one thousand nine hundred and eighty-eight.

Present: HON. AMALYA L. KEARSE,
HON. LAWRENCE W. PIERCE,
HON. GEORGE C. PRATT,

Circuit Judges,

EDNA H. SOBEL, M.D., and BELLA C. CLUTARIO, M.D. on behalf of themselves and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Plaintiffs,

87-7373

EDNA H. SOBEL, M.D., on behalf of herself and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Plaintiff-Appellant,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor,

— against —

YESHIVA UNIVERSITY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

ELAINE B. GOLDSMITH,
Clerk

/s/Edward J. Guardaro

by: Edward J. Guardaro,
Deputy Clerk

ISSUED AS MANDATE: 3-29-88

APPENDIX F

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of March one thousand nine hundred and eighty-eight.

EDNA H. SOBEL, M.D., and BELLA C. CLUTARIO, M.D. on behalf of themselves and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Plaintiffs,

EDNA H. SOBEL, M.D., on behalf of herself and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

87-7373

Plaintiff-Appellant,

—and—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor,

—against—

YESHIVA UNIVERSITY,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the **Appellee YESHIVA UNIVERSITY.**

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/Elaine B. Goldsmith

Elaine B. Goldsmith
Clerk

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NO. 87-2056

YESHIVA UNIVERSITY,

Petitioner,

– vs. –

EDNA H. SOBEL, M.D.,
on behalf of herself and other professional faculty members
employed by the defendant, YESHIVA UNIVERSITY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent, Edna H. Sobel, M.D. and the certified class of women faculty on whose behalf she is suing, oppose the granting of certiorari to the petitioner on the grounds that the issues as set forth in the petition present no appropriate question for review by this court and, in all events, misstate the holding of the court below. In addition, petitioner would mislead this Court in formulating its third issue which petitioner grounds upon an incomplete and expurgated opinion of the court below.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals reversing the order of the district court ("Sobel IV") is incorrectly reported at 839 F. 2d 18 (2d Cir. 1988), and further incorrectly reproduced in Petitioner's Appendix A to its petition at A-1-34. The complete and correct opinion as filed in the office of the Clerk of the Second Circuit and as sent to counsel for plaintiffs and defendant in typewritten form and later in slip opinion appears in Respondent's Appendix, RA at pages 1-43.

STATEMENT OF THE CASE

Plaintiff Edna H. Sobel, M.D. and a certified class of 95 female physician-faculty employed by Albert Einstein College of Medicine ("AECOM" referred to by the court below as "Yeshiva"), a college in Yeshiva University, sued the petitioner for discrimination in salary on account of gender throughout a period commencing in 1974 and ending in 1979 in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

The case had been tried in the District Court in 1982. At the conclusion of the case, the court dismissed plaintiffs' complaint and rendered a decision for the defendant. For reasons not relevant here, plaintiffs did not file their timely notice of appeal until December,1985. Plaintiffs-appellants' brief had been submitted to the court below prior to July 1, 1986, when this Court decided *Bazemore v. Friday*, 478 U.S. 385 (1986). The plaintiffs' case advanced arguments which paralleled the holding of *Bazemore*. Reversal of the trial court's decision was required, therefore, because that court had ruled that pre-Act discrimination did not have to be remedied after the Civil Rights Act had become applicable to universities and had discounted plaintiffs multiple regression analyses based on defendant's contentions that plaintiffs' experts had omitted non-quantifiable variables from the analyses. Moreover, the trial court had mistakenly ruled that plaintiffs were barred

by an inapplicable procedural rule from urging disparate treatment of and/or disparate impact on women faculty as compared with men on its erroneous finding that the claim of disparate impact was first made tardily in the middle or end of the trial.

The Court of Appeals, ruling on August 20, 1986, remanded the case to the district court for "reconsideration and if necessary further proceedings" in the light of *Bazemore* "particularly with respect to the significance of pre-act discrimination and the evidentiary weight to be afforded multiple regression analysis" (A-48)

Counsel for plaintiffs briefed the district court at length on the two issues and urged reconsideration of the evidence already adduced at trial and the reconsideration of rejected exhibits as well as the taking of additional evidence -- all predicated on premises previously rejected by the trial court in specific colloquies brought to the trial court's attention, and requiring reconsideration in accordance with the instruction of the Court of Appeals.

Instead of reconsidering the evidence as directed by the Court of Appeals, the trial court issued an opinion on March 24, 1987, in which it "adhered to" its previously issued opinion without any change in its reasoning, findings or legal conclusions (A-35).

The district court failed to recognize the identity of issues between the case at bar and *Bazemore*. The court held that the cases were "markedly" different because *Bazemore* concerned a claim of discrimination against blacks--outlawed by the constitution--and the instant case concerned gender discrimination which had no such protection (A-37). The court further held that paying women less than men in the late 1960s and early 1970s "was considered not only socially acceptable but also socially desirable. . ." (A-39).

The district court saw no reason to change its decision concerning the procedural rule on which it had barred plaintiffs' claim of disparate impact, despite its being shown that the rule was inapplicable because plaintiffs had consistently, prior to and during the trial, maintained that all pre-Act discrimination had to be eliminated on the day Title VII became applicable to universities and that no such redress had occurred in this case (A-40,41).

In considering statistical evidence, the district court stated that statistical proof proffered by plaintiffs of more than two standard deviations (two standard deviations means that there is less than one chance in 20 that the results can be attributed to chance) was "borderline" (A-43) against the teaching of *Bazemore* and a line of cases decided by this Court which support a

finding that two standard deviations is sufficient to prove a plaintiff's prima facie case of discrimination. In sum, the court found that *Bazemore* required no change in its conclusion (A-44).

The Court of Appeals, understandably, found most disturbing the rejection by the district court of the clear holding of *Bazemore* with respect to the issues before it and the district court's republication of its original, as events were to show, erroneous opinion after being specifically directed to reconsider those issues.

Petitioner's First Question Presents No Issue for Review

Petitioner's first question reads:

> "Whether the admission of a Title VII plaintiff's statistical evidence of gender-based disparate pay, which fails to account for significant non-quantifiable pay determinants, shifts the burden of proof to defendant to prove that the omitted pay determinants are correlated with sex, and deprives the District Court of discretion to determine that the omitted pay determinants render the statistics insufficient to prove plaintiff's claim in light of all the evidence in the case."

Nowhere in the opinion of the Court of Appeals is there the statement, as posed here by petitioner that the burden of proof in a Title VII case is ever shifted to the defendant to prove the negative as to a discrimination claim. Instead the court chided the district

court for not giving proper weight to the *plaintiff's* effort to carry the burden of proof, which included evidence of pre-Act discrimination. In failing to do so, the district court was acting on its erroneous theory of the law. On this issue, the court below said:

> "In light of *Bazemore*, various of the district court's rulings became erroneous. The most obvious error (with hindsight) was that the court discounted the weight to be accorded plaintiffs' regression studies in part because plaintiffs had not eliminated the effects of pre-act salary discrimination. While this was not the only basis on which the trial judge rejected plaintiffs experts'conclusions, it is clear from his opinion, as well as from his intense questioning of plaintiffs' experts on this very issue that this was a critical element in his mind.(RA-25)
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> * * *
>
> "We expected with our earlier remand in in this case that the district court would reopen the case for the admission of additional evidence, including some that originally was excluded, and for reevaluation of the entire record as supplemented in order to consider the related questions of whether there was pre-act discrimination and whether it was, in fact, carried over into the actionable period. *Bazemore* gave plaintiffs the right to such an inquiry, a right denied to them by the district court's cursory treatment of the case on remand." (RA-27)

The Court of Appeals at no time suggested that the full burden of proof did not lie with plaintiffs; it sent the case back to the district court for a retrial of the issues giving appropriate weight to the ruling of

this Court in *Bazemore.* Said the court below:

> "To summarize, the case is remanded for a retrial which shall include full consideration of plaintiffs' claim that there were pre-1972 salary disparities carried over into the post-1984 limitations period because of Yeshiva's failure to equalize salaries upon its being covered by Title VII, and reconsideration of plaintiffs' claims for the entire class in light of all the evidence, with their regression analyses to be evaluated in accordance with *Bazemore's* principles." (RA-43)

On the issue urged here by petitioner that the plaintiffs failed "to account for significant non-quantifiable pay determinants," the court below -- far from shifting the burden of proof -- held that

> "Yeshiva contended that Sobel had left out several important variables that would represent productivity and, implicitly reduce the sex coefficient by explaining some of the disparity in salary which plaintiffs' experts had attributed to gender discrimination...Yeshiva did not show that, with these factors accounted for, the apparent gender disparity was reduced. Yeshiva's experts simply criticized plaintiffs' failure to include them, offering no reason in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient." (RA-35)

Petitioner will yet have its day in court under the ruling of the Court of Appeals, viz.:

> "Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable, but such an attack should be specific and make a showing of

relevance for each particular variable it contends improperly omitted." (RA-35)

The petitioner further will have an opportunity to invoke as far as it may be relevant the standards of proof outlined in the recent decision of this Court in *Watson v. Fort Worth Bank and Trust Co.* ___U.S. ___, decided June 29, 1988. It is clear, however, that the first issue as postulated by petitioner fails for lack of record support.

Petitioner's Second Question Presents No Issue for Review

Petitioner's Second Question reads:

> "Whether this Court's decision in *Bazemore v. Friday*,. . .requires a finding on whether there were gender-based pay differentials at any time prior to the applicablity of Title VII, if the District Court finds no meaningful proof of the existence of pay disparities at the commencement of the actionable time period, and no proof of disparate treatment thereafter."

In posing the question thus, the petitioner misstates the findings of the district court in its 1983 opinion (*Sobel I*), where that court's initial decision republished in (*Sobel III*) discusses the issue and makes its initial findings which were contrary to this Court's *Bazemore* ruling. Said that court in (*Sobel I*):

> "The only general evidence of an anecdotal nature that had any significance was the fact that during 1972, the year that Title VII became applicable to universities, a faculty senate

committee at Einstein appointed a subcommittee to investigate the existence of sex discrimination in pay. The subcommittee prepared a report which included a review of the gross salary levels of male and female faculty members. The sub-committee which was known as the Senate Committee on Women's Rights, after reviewing limited and incomplete salary information, wrote a report which, among other things, suggested that the mean salary of Einstein's female faculty members was approximately fifteen percent lower than that of their male colleagues. This report was distributed to members of the faculty senate. Some faculty members were of the personal belief that female professors at Einstein (as well as at other institutions and in society in general) were being paid lower salaries because of their sex.

"Although the evidence of subsequent actions was somewhat vague, it suggested that some efforts were made, starting in 1972, to compensate female faculty for prior inadequate salaries." (A-84)

The above statement by the district court cannot in any way be construed as that court's finding that there was "no meaningful proof of the existence of pay disparities at the commencement of the actionable time period." The language of the district court accepting the premise of "prior inadequate salaries" at the very least suggests a finding that these inadequate salaries were paid to woman faculty prior to the Civil Rights Act's effective date. On this issue, the court below found:

"While it is true that Yeshiva has always maintained that there is no evidence even of pre-act discrimination, and has relied only as a secondary position on the idea that

> if there was discrimination it must have been pre-1972, the district court appears to have accepted that secondary position as at least part of the true explanation for the current (i.e. 1974-1979 disparities). . .While the district court was appropriately cautious about making an unnecessary (given its view of the pre-*Bazemore* law) determination of whether plaintiffs allegations of pre-act salary discrimination had been proven, such a determination is now rendered necessary by *Bazemore*." (RA-31)

In *Sobel I* which the district court affirmed in *Sobel III*, the court compared its findings to those in *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977). i.e. "that any discriminatory act which occurs before the onset of the relevant limitations period cannot be considered an illegal act." (A-90)

The district court, having impliedly if not expressly found that there was discrimination before the act became effective, did not regard this evidence as important. Said the court,

> "Such evidence is. . .entitled to little weight and constitute[s] only relevant background evidence." (A-85)

The court further found that there was no "present" violation of the Civil Rights Act because it found that the guideline yearly increments given to both men and women faculty through the relevant period were "neutral" in their effect. What the court meant as "neutral",

however, is best explained by a colloquy the court engaged in with plaintiffs' trial counsel and expert witness.

> "The position you are arguing for is that since they give salary increases yearly, albeit on a sort of guideline across-the-board basis, that as of the first year the act becomes effective they were required to correct all pre-act inequities and to immediately bring all females to the salary level discriminated against, perhaps for many years before the act, and if you are correct in that regard you have made a profound impact on American law, and there are going to be lawsuits like you can't imagine springing up all over the place " (Transcript pp. 383,384)

> "...I am rejecting your position that each year when they gave out the salary increases they have had a requirement to evaluate each person anew and to give them the salary that they innately were entitled to at that point, regardless of how much they made the year before. (Transcript p. 385)

> "The guidelines usually seem to be a percentage. Sometimes it was a fixed amount, but usually it was a percentage." (Transcript p. 714)

It is clear from the above that the trial court, was not in the least disturbed about the situation prevailing before the Act applied to universities, nor did the court believe it needed to concern itself with making findings, except in passing, that women were generally paid less and that it was "socially acceptable" and even "socially desirable" to do so. After the Act had become applicable the only obligation of the university, said the trial court, was to make neutral increases--defined as giving the same *percentage* in-

creases to men and women even though it is clear that if men faculty received more than women pre-1972 for the same or similar work, percentage increases thereafter would perpetuate the initial inequity and increase the absolute disparities.

As to the Court of Appeals statement that *Bazemore*. . . represented an important and dramatic shift in Title VI law" as stated in the petition, p. 26, this Court said in *Bazemore* on the issue of the obligation of employers to make pay equal as of the time of the effective date of the Civil Rights Act,

> "The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion; that the Extension Service discriminated with respect to salaries *prior* to the time it was covered by Title VII does not excuse perpetuating that discriminaton *after* the Extension Service became covered by Title VII. . .The Court of Appeals plainly erred in holding that the pre-Act discriminatory difference in salaries did not have to be eliminated." 92 L Ed at p. 328

Petitioner's Third Question Presents No Issue for Review

Petitioner's Third Question reads:

> Whether the Court of Appeals exceeded its authority, and usurped the assignment power expressly conferred by Congress upon the District Courts, by ordering that the case be assigned to a different District Court judge on remand, where there was no motion to recuse or disqualify, and no finding of bias or persistent misapplication of law, and where the sole basis for the order was an appellate panel's perception that the judge's

efforts, after twelve years on the case, suddenly became inadequate.

Petitioner's argument that this Court should review the Court of Appeals' order that the case at bar be tried by a different district court judge is predicated on a scholarly protest and criticism of the action by the Chief Judge of the Eastern District of New York * and on an incomplete copy of the opinion of the court below which omitted a paragraph in which the court explained why it was taking this action. That omitted paragraph which follows the language at the bottom of A-33,"[i]t was only after *Bazemore* that his [the trial court judge] efforts to that point became inadequate" reads as follows:

> "Nevertheless *Bazemore* exists, and we are concerned over what appears to be an unwillingness on the first remand to deal with its implication and the remedial obligations it may impose on Yeshiva. Perhaps this is understandable--the case began in 1975, the trial occurred in the fall of 1982, and it is natural to consider such events as part of the past and wish to avoid dealing with them afresh--but such an inclination leads us to doubt the district judge's receptivity to the case plaintiffs are entitled under *Bazemore* to try to make. The finding of a "procedural bar" to plaintiffs'continuing effects claim is so contrary to the record in this case that it suggests a strong desire to escape dealing with the case again and such is not proper treatment for a remand order" (RA-42)

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* See J.Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, ___F.R.D.___1988.

The quotations from the trial court's opinion cited *supra* under points one and two illustrate how the trial court apparently deliberately ignored this instruction to it from the appellate court to consider the implications of *Bazemore* on the issues of pre-Act discrimination as well as on the significance of multiple regression analyses in a gender discrimination case. The action of the Court of Appeals was a practical reaction to the prospect of yet again having to review and reverse the trial court.

In the Weinstein article there is extensive discussion of procedures followed by the district courts and specifically the district court in the Eastern District of New York in criminal cases. These procedures under the local rules require the reassignment of a case by the clerk of the court after a judgment of reversal for very much the same reasons as are here implied -- involving the possible fixed idea of a judge about a case in the criminal mode. Since we are here, however, dealing with a civil case, the procedures in criminal cases are not relevant. Judge Weinstein gives a thorough review of the historical background of the control of individual judges, "a subject of interest since at least as early as Roman times." In making the historical review, however, Judge Weinstein concludes that "[m]uch of this constitutional and English history is not helpful in resolving the issue [power of the Court of Appeals to order that a case be heard on

retrial by another district court judge] because the courts of appeals are a relatively late addition to our federal court structure."

Petitioner concedes in the argument advanced on this issue that 28 U.S.C.§2106, the legislative conferral of jurisdiction and power on the courts of appeal, provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

When the Court of Appeals ordered that another judge preside over a new trial here, it was "requir[ing] such further proceedings to be had as may be just under the circumstances." It was *not* excercising a "power to assign" a judge, as maintained by petitioner, and impliedly by Judge Weinstein who jealously guards the prerogative of assignment as belonging to the Chief Judge of the district court. The court below simply declared that one judge who had already considered the case, could not continue to do so in the interests of justice. It gave its reasons for doing so which appear clear and reasonable under the circumstances. The assignment to a new judge was to take place under the rules providing for that assignment, 28 U.S.C. §137. Those rules cannot be read as taking away an appellate court's authority

under §2106 to make an order meeting the ends of justice as it sees appropriate, nor does it trench upon the authority of the Chief Judge to assign a judge to try the case in accordance with the law.

Judge Weinstein concedes that "[t]he appellate court's function is to remedy error of law...Not far from the power to review judgments is the power to decide, after *repeated* misapplication of the law by the district judge, that correction of the error requires reassignment." In the case at bar, the appellate court found there was a *repeated* misapplication of the law by the trial court judge.

Judge Weinstein's criticism, however is based on his view that the reassignment of a judge should take place only when sought by counsel for one party or the other who must bring either a writ of mandamus or a proceeding alleging bias or prejudice under 28 U.S.C.§144 or §455, and evidently under no other circumstances.

Following this narrow view, Judge Weinstein says of what took place here:

> "The reassignment order in *Sobel v. Yeshiva University*, 839 F. 2d 1988 (2d Cir. 1988) and other recent court of appeals cases violate this norm [invoking the All Writs Act, 28 U.S.C. §1651] where neither a motion to recuse nor mandamus was utilized."

The fact that Judge Weinstein cites the West report citation of the opinion of the appellate court in

this case suggests that he may never have known about the paragraph in which the Court of Appeals gave its reasons for the reassignment, which were somehow deleted from the West report.

The answer to petitioner's argument and that of Judge Weinstein is that there is no statutory authority cited which deprives the courts of appeal of the authority to reassign a case after reversing and remanding it. Both past historical scholarship and more recent history have no precedents which take away the power of the circuit courts to reassign a judge in a given case. There are two statutes--one giving authority to the Supreme Court and the courts of appeals to make the appropriate rulings on review of the facts and law below (§2106), and the other granting to the chief judge of the district the responsibility of dividing up the cases and assigning the cases under the court rules (§137). In the case at bar, the Chief Judge for the Southern District of New York has already excercised his authority under §137 by assigning a new judge to try this case. That judge is awaiting the action of this Court before proceeding with the case which is now going on fourteen years of age.

CONCLUSION

This Court should deny the petition for certiorari in all respects.

Respectfully submitted

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RESPONDENTS' APPENDIX

THE OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT AS FILED IN THE CLERK'S OFFICE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 204—August Term 1987

Argued: October 14, 1987 Decided: February 4, 1988

Docket No. 87-7373

EDNA H. SOBEL, M.D., and BELLA C. CLUTARIO, M.D., on behalf of themselves and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Plaintiffs,

EDNA H. SOBEL, M.D., on behalf of herself and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Plaintiff-Appellant,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor,

—against—

YESHIVA UNIVERSITY,

Defendant-Appellee.

Before:

KEARSE, PIERCE, and PRATT,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, entered after a remand by this court.

Reversed and remanded.

ELEANOR JACKSON PIEL, New York, N.Y., *for Plaintiff-Appellant*.

DANIEL RIESEL, New York, N.Y. (Lawrence R. Sandak, Robert R. Reed, Sive, Paget & Riesel, New York, N.Y., of counsel), *for Defendant-Appellee*.

PRATT, *Circuit Judge*:

In his masterpiece *Bleak House*, Charles Dickens painted a scathing portrait of the hopeless complexity of the handling of cases in England's High Court of Chancery. Dickens wrote, "[T]hrough years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends. And we can't get out of the suit on any terms, for we are made parties

to it * * *." Mindful of the example of the never-ending litigation that marked Dickens's Chancery Court, it is with regret that we find it necessary to once again remand this nearly thirteen-year old action to the district court, for new proceedings which we can only hope will at last end the litigation between these parties.

This is a complicated sex discrimination class-action suit against Yeshiva University. The core complaint alleges that Yeshiva discriminated against women faculty members at its medical school, the Albert Einstein College of Medicine ("AECOM"), by paying them a lower salary on the basis of their gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. The alleged violations run from 1974, the earliest date for which the statute of limitations had not run at the time plaintiffs filed suit in 1975, to 1979.

After seven years of discovery, trial began in September 1982, with plaintiffs' case being carried for the most part by the intervenor, the Equal Employment Opportunity Commission ("EEOC"). After approximately three weeks of trial, the district judge took the matter under advisement, rendering his decision in June 1983, when he determined that plaintiffs had failed to establish a *prima facie* case of disparate treatment in faculty salaries, that their claim of disparate impact was procedurally barred, and that defendant's pension plan, based on sex-segregated mortality tables, was illegal. *Sobel v. Yeshiva University*, 566 F. Supp. 1166 (S.D.N.Y. 1983) ("*Sobel I*"). The last of these findings is not relevant to this appeal.

On appeal, this court remanded the case for reconsideration in light of the Supreme Court's intervening decision in *Bazemore v. Friday*, 106 S. Ct. 3000 (1986). *Sobel v.*

Yeshiva University, 797 F.2d 1478 (2d Cir. 1986) ("*Sobel II*"). On remand, the district court adhered to its initial decision, concluding that the procedural bar it had initially found to preclude plaintiffs from raising their "disparate impact" claim was a sufficient independent basis for its original decision, *Bazemore* and this court's remand order notwithstanding. *Sobel v. Yeshiva University*, 656 F. Supp. 587 (S.D.N.Y. 1987) ("*Sobel III*"). Because we conclude that there was no "procedural bar", and that plaintiffs' *Bazemore* claim, whether it is characterized as one of "disparate treatment" or "disparate impact", deserves full and fair evaluation, we again remand, but this time for a new trial on that claim. For reasons discussed below, we direct that the case be reassigned to a different district judge.

BACKGROUND

In 1972, named-plaintiff Dr. Edna Sobel, a faculty member in the pediatrics department at AECOM, began to express dissatisfaction with her salary, which she contended was too low for a full professor of her experience and stature. She complained to her then department head, Dr. Lewis Fraad, and for the next two years received so-called "out-of-guideline" increases in salary. The second of these increases, however, was not sufficiently large to satisfy Dr. Sobel, and she initiated this lawsuit, having told Dr. Fraad that "It seems that I am going to have to sue to get appropriate pay." Trial Tr. at 1144-51.

The basic structure of AECOM's faculty and salary systems are set forth in *Sobel I*, with which we assume familiarity. *See Sobel I*, 566 F. Supp. at 1169-73. By the

time of trial, Sobel had been joined by Dr. Bella Clutario as named plaintiffs. The class they represented had been reduced to full-time female faculty members with M.D. degrees employed by AECOM between 1974 and 1979, a group that numbered from 49 to 60 during each year out of a total full-time faculty that ranged from 204 to 295 during the period.

The salary received by any one faculty member was a result of numerous factors, some readily quantifiable and some inherently amorphous. The parties agreed on the importance of such factors as experience, numbers of publications in scholarly journals, and the department in which the doctor worked. They further agreed that the rank held by a particular faculty member (assistant professor, associate professor, or full professor) was a factor influencing salary, although plaintiffs raised strong objections to its inclusion on grounds we will soon discuss.

The nub of the dispute, of course, was whether plaintiffs adequately established that when such legitimate factors were accounted for in the admitted disparity between the average salaries of male and female faculty members, there remained a difference that could be explained only by reference to the person's sex.

Plaintiffs attempted to demonstrate this proposition using a common statistical tool, multiple regression analysis, which is designed to isolate the influence of one particular factor—here, sex—on a dependent variable—here, salary. One of plaintiffs' expert witnesses, Dr. Orley Ashenfelter, testified that the plaintiffs' statistical model was designed to approximate the factors that influenced salary at AECOM, so that "any differences between the salaries of men and women that were not explained by the pertinent variables to be used in the model had to be the

result of sex discrimination." *Sobel I*, 566 F. Supp. at 1174. As with any multiple regression analysis, the validity of the influence attributed to a particular variable will depend heavily on how accurately the model mimics the actual factors influencing the dependent variable, salary. For example, if the model omits an important variable that affects salaries, the portion explained by that variable will seem to be unexplained, and thus may erroneously be attributed to sex. Conversely, if an extraneous factor is erroneously credited with influencing salary, it may serve to mask the effect of sex on faculty compensation.

After considerable wrangling, the parties were able to agree on virtually all of the data to be used in the studies to be done by their experts. The data base included the names of the several hundred M.D.s employed as faculty by AECOM during the relevant period, their salaries from year to year (and, therefore, the incremental year-to-year increases in salary of each faculty member), their rank or ranks during the period, the frequency of their publications, their experience, both at AECOM and as reflected in the number of years since they received their M.D.s, and various other information.

From this agreed-upon data base, the parties proceeded in different directions. From their studies, "plaintiffs' experts determined to their satisfaction that the salary differences disfavoring women were statistically significant (at the 0.05, or two standard deviation, level) for the year 1970 and the years 1973 through 1978." *Id.* at 1175.

Yeshiva's experts attacked both the adequacy of a multiple regression analysis generally in this sort of employment context, and the particular study done by plaintiffs' experts. Their conclusion, based on their own study

of the data, was that there was no evidence of salary discrimination, either in the initial setting of salaries or in the annual wage increases. Further, they argued that, when the proper variables were included (and the improper ones excluded), even a multiple regression did not show a statistically significant salary disparity based on sex.

The district court largely accepted the conclusions of Yeshiva's experts. It found plaintiffs' regression analysis to be riddled with "major shortcomings". Among these was the failure adequately to deal with the relative disparity in salaries between faculty members in the clinical departments, which tend to be both disproportionately male and higher paid, and in the "pre-clinical" departments, which were heavily female and relatively lowly paid. In addition, the district court faulted plaintiffs for failing to distinguish between clinicians who were primarily researchers and those whose primary activity was the practice of medicine, and for failing adequately to account for "inherent departmental stratification". Most important, the court concluded that plaintiffs' variables that attempted to act as proxies for the inherently amorphous impact of "productivity" on salary "failed to adequately account for the true productivity differences and that the consequential underadjustment for these differences resulted in an overestimate of the sex coefficients." *Id.* at 1179.

In order to introduce a variable that would at least approximate productivity, Yeshiva proposed, and the district court accepted, using the rank of the faculty member. Sobel strenuously objected to including rank as a variable, arguing that it was not an independent variable, because an individual's rank resulted from the same

factors that determined salary increases. However, the district court believed rank served to capture intangible factors that did not affect the annual salary increase a faculty member received. *Id.* at 1180.

The plaintiffs also objected to using rank on a more fundamental ground. For the very reason the district court felt rank should be used—that it reflected intangible productivity factors—plaintiffs argued that there was a serious risk that *impermissible* factors would have entered into promotion decisions, and thus that rank, insofar as it determined salary, might reflect sex discrimination. Because of this risk, plaintiffs urged, "academic rank should have been included as an explanatory variable only where there was clear evidence that neutral and objective standards had consistently been followed and there was no chance that the decisions regarding rank had been affected by sexual discrimination." *Id.* The district judge concluded, however, "that promotions in rank * * * were in fact based on merit and were not contaminated by elements of sexual discrimination." *Id.* (footnote omitted).

Based on these and other difficulties it had with plaintiffs' multiple regressions, the district court held that plaintiffs had failed to make out a case of disparate treatment in faculty salaries. One of the factors leading the court to adopt Yeshiva's view was that plaintiffs did not factor out the effects of discrimination in salaries that occurred before Title VII was made applicable to universities in 1972 ("pre-act"). Under its view of the law, discrimination originating in the pre-act period was not a valid basis for a current finding of a Title VII violation, and the trial court faulted plaintiffs' conclusion because their study "was not designed to analyze the extent to

which salary differentials may have been the consequence of discriminatory acts that occurred" before 1972. *Id.* at 1182.

This view also led the district court to reject what it characterized as plaintiffs' "disparate impact" claim, which consisted of the contention that the women faculty members hired before 1972, who allegedly received discriminatorily low starting salaries, never "caught up" to their male counterparts. In the district court's view, this constituted a disparate impact claim because the mechanism for determining salary increases, the "guideline" system, which provided men and women with roughly equal raises in percentage terms, amounted to a facially neutral system that had the effect of keeping women's salaries on the AECOM faculty perpetually lower than men's. Such a facially neutral system that is alleged to have an effect that disproportionately harms a particular group is the essence of a "disparate impact" claim. *See generally Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

As a general rule, faculty members received the "guideline" increase, which in some years was a simple percentage and in others was a percentage combined with a minimum raise in absolute terms. Some faculty members in some years received what were referred to at trial as "out-of-guideline" increases, normally given when a faculty member was able to convince his department head that his salary was inequitably low and that he should take up the professor's cause before the administration.

The district court rejected the disparate impact claim on two grounds. First, it found the argument procedurally barred, because plaintiffs had not raised it until late in the trial, after seven years of discovery; it thus seemed

unfair to Yeshiva to face an entirely new claim so late in the game.

Second, the court found that any disparities in salaries perpetuated by the guideline system resulted from pre-1972 hires and pre-1972 salaries, which the court said "did not have to meet the standards established under Title VII." 566 F. Supp. at 1188.

While plaintiffs' appeal from this judgment was pending, the Supreme Court decided *Bazemore*, in which the Court held that a pre-act salary disparity that is carried over into the period following application of the act constitutes a violation of the act. As Justice Brennan wrote for the Court,

> A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, he is liable under that statute.

106 S. Ct. at 3006. *Bazemore* thus represented an important and dramatic shift in Title VII law. Most of the lower federal courts had interpreted the Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977), as holding that employers did not have to equalize salaries that were discriminatory if the disparity originated prior to the application of Title VII. *See, e.g., Ste. Marie v. Eastern R. Ass'n*, 650 F.2d 395, 404 n.11 (2d Cir. 1981); *Farris v. Board of Educ.*, 576 F.2d 765, 769 (8th Cir. 1978). Since *Bazemore*, courts have recognized as a valid claim for relief the allegation that an employer has failed to remedy the continuing effects of pre-act salary discrimination. *See Trout v. Lehman*, 652 F. Supp. 144, 146

(D.D.C. 1986); *cf. Rodriguez v. Chandler*, 641 F. Supp. 1292, 1298 n.18 (S.D.N.Y. 1986).

The *Bazemore* Court also addressed a key evidentiary issue: the weight to be accorded a multiple regression analysis which purports to show discrimination, but which the defendant argues fails to account for certain relevant variables. The Court held that the "failure to include variables will affect the analysis' probativeness, not its admissibility." *Id.* at 3009 (footnote omitted).

In the new light cast by *Bazemore*, we remanded this case to the district court to afford it an opportunity to determine in the first instance what effect it might have. *Sobel II*, 797 F.2d 1478. On remand, however, the district court made no attempt to assess the full impact of *Bazemore* on plaintiffs' claims and evidence. Instead, the court adhered to its earlier judgment on the technical basis that even if *Bazemore* altered the law on the substantive issues, its ruling that plaintiffs had failed to raise their "disparate impact" theory until it was unfair to Yeshiva, provided a sufficient independent basis to uphold the judgment dismissing the complaint. *Sobel III*, 656 F. Supp. at 590-91. This second appeal followed.

DISCUSSION

1. *The "Procedural Bar" to Plaintiffs' Disparate Impact Claim.*

We first address the district court's holding that plaintiffs were precluded from raising a disparate impact claim against Yeshiva because of their failure to raise the claim "until the last minute", *Sobel III*, 656 F. Supp. at 590, that is, "midway through the trial." *Sobel I*, 566 F. Supp.

at 1186. While we recognize that the district court is vastly more familiar than are we with the details of the seven years of pretrial proceedings in this case, we are, frankly, somewhat perplexed by this finding of a "procedural bar". In our view, the essence of plaintiffs' case was well known to Yeshiva throughout—and in fact long before—the trial, and it consisted of precisely the claim the district court found not to have been raised until midway through trial. Moreover, the distinction between "disparate treatment" and "disparate impact" cases drawn by the district court artificially and unrealistically pigeon-holed plaintiffs' claim. Finally, even were we to agree that there was some distinct disparate impact claim that was not raised by plaintiffs until midway through trial, the district court on remand should not have precluded the claim because of the change in the law wrought by *Bazemore*. We address these points in turn.

A. *The Timeliness of Plaintiffs' Claim.*

While it is true that a litigant may be barred from raising a claim if it would work an unfair surprise on her adversary, *see Ste. Marie*, 650 F.2d at 399 n.2 (attempt on appeal to argue that evidence supported disparate impact theory not argued at trial rejected as "belated"); *Presseisen v. Swarthmore College*, 442 F. Supp. 593, 603 (E.D.Pa. 1977), *aff'd without op.*, 582 F.2d 1275 (3d Cir. 1978); *cf. Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 604-05 (2d Cir. 1986) (where plaintiff raised only disparate treatment argument at trial, "it would have been unfair to evaluate the evidence under the disparate impact theory after trial"), the critical question is whether the claim was in fact not raised until it was too late. We need not consider here whether the point indicated by the district court when plaintiffs allegedly first raised the

disparate impact claim ("midway through the trial") would have been too late, since the record contradicts the district court's view and shows the claim was raised well in advance of trial.

The district court, and to some degree the parties, became caught up in the labels applied to claims, as opposed to the actual nature of them. Sobel argues on appeal that the single mention of the magic phrase "disparate impact" in the EEOC's pre-trial memorandum was sufficient to raise the claim. This argument misses the point; what is important is whether the defendant was reasonably aware of the claim, not whether plaintiffs at some time in the pre-trial period happened to use the right phrase. *See Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) (question is whether the time at which defendants were made aware of the thrust of plaintiff's case "will unfairly prejudice the defendants in their defense"); *see also* 5 C. Wright & A. Miller, Federal Practice and Procedure, § 1219 at 145-46 (1969 & 1987 Supp.).

Having examined the trial transcript and reviewed the pre-trial documents in the record on appeal, we are convinced that Yeshiva was fully cognizant that plaintiffs' claim consisted of the central allegation that the system of guideline salary increases left the plaintiff class perpetually behind their male counterparts on the AECOM faculty. The trial brief jointly submitted by plaintiffs and the EEOC contained the following argument:

> While it may not have been unlawful for AECOM to discriminate against women prior to 1972, such conduct did become unlawful after March 24, 1972. AECOM officials had broad discretion to set and adjust salaries, including discretion to correct salary inequities and * * * [t]his discretion provided a

> ready mechanism for remedying salary in equities based on sex. Accordingly, each time AECOM paid a faculty member after 1972, by regularly issued pay checks * * * it reasserted its prior discriminatory salary determinations.
>
> * * * *
>
> Assume an employer in 1963 hired white vice-presidents at a salary of $10,000 per year and black vice-presidents at $8,000 per year. * * * In 1965, when private employers became subject to the provisions of Title VII, this hypothetical employer would have had a clear obligation under law to equalize the salaries of the white and black vice-presidents. If the employer merely awarded * * * raises on a nondiscriminatory basis, the prior racial classifications would not only continue, but indeed be created anew with each paycheck.

Plaintiffs' Trial Br. at 14-15. This argument was not lost on Yeshiva, for it went to some lengths to respond. For example, Point III of Yeshiva's trial brief was addressed to what Yeshiva saw as a fatal flaw in plaintiffs' regression: that it failed to separate out the effects of pre-act salary disparities, which were not illegal and, in Yeshiva's view, could not support a finding of a present violation. As Yeshiva argued,

> Plaintiffs in this case stand in no better position than the unsuccessful plaintiff in *Farris v. Board of Education*, 576 F.2d 765 (8th Cir. 1978). In that case, the Court dismissed plaintiff's claim that her salary was comparatively low because annual raises were based on each previous year's salary and her prior salary had been reduced when she took an unpaid maternity

> leave. While that past act might have constituted discrimination had it not occurred before the passage of Title VII, the defendants' current policy of granting raises based on each previous year's salary was a neutral one and, therefore, her claim was defeated.

Defendant's Trial Brief at 49. Yeshiva went on to argue, "Plaintiffs [sic] yearly salary regressions of faculty hired both before and after the statute of limitations are only probative if AECOM was legally obligated to remedy time-barred discrimination * * * ." *Id.* at 50. After *Bazemore*, however, the point is not whether Yeshiva had to remedy time-barred discrimination (which would be pre-1974), but rather whether it had to remedy discrimination in the limitations period but which originated prior to the application of Title VII to universities in 1972. Nevertheless, it is clear that in its trial brief Yeshiva regarded at least one of the plaintiffs' claims as resting on an obligation to equalize salaries once Title VII applied to universities—the very claim the district court found to have been suddenly sprung on Yeshiva midway through the trial.

If these excerpts did not establish Yeshiva's awareness of this aspect of plaintiffs' case, the summation of its position in the pretrial brief surely did: "[T]he focus is not on the 'bottom line', which in this case would be the alleged salary disparities, but rather on the present employment practices and policies, such as the setting of starting salaries and annual increases, during the relevant time period." *Id.* at 51. We conclude that defense counsel was here responding to the claim he perceived plaintiffs to be raising at that time—prior to trial.

Our reading of the trial transcript bolsters our conclusion that plaintiffs were from the outset raising the claim

that the guideline system operated to maintain women's salaries at a discriminatorily low level that had been set, for the most part, prior to 1972. Early in the trial, during the testimony of Dr. Ephraim Friedman, only the third witness, the district judge made the following statement of Sobel's case:

> THE COURT: The position you are arguing for is that since they give salary increases yearly, albeit on a sort of guideline, across-the-board basis, that as of the first year the act becomes effective they were required to correct all pre-act inequities and to immediately bring all females to the salary level that they would have been at if they had not been discriminated against, perhaps for many years before the act * * *.

Trial Tr. at 383. At least at that early stage of the trial, if not before, the district judge understood plaintiffs to be raising the argument that guideline increases, given presumably equally to both men and women, would not meet Yeshiva's obligation to eradicate continuing effects of pre-1972 discrimination. Indeed, he told plaintiffs that "you may correctly assume that I have not bought your argument *in your trial memo* that *Evans* notwithstanding, failure each year to correct pre-act discrimination constitutes an offense under the act." *Id.* at 382 (emphasis added). To be sure, the court did not accept the argument; nevertheless, plaintiffs did raise it.

In fact, this understanding of plaintiffs' central argument pervaded the trial. The trial court repeatedly expressed skepticism over the validity of plaintiffs' regressions because they did not separate out the effect of salaries that, even if discriminatory, were established before 1972 and were not, in the district court's view of

pre-*Bazemore* law, required to be increased. For example, the court engaged in this exchange with one of plaintiffs' expert witnesses, Dr. Donald Wise, and plaintiffs' counsel, Michael Buchwach:

> THE COURT: If * * * you are attempting to establish whether there are gender based discriminations only in years after a certain date and if some of the people were hired before that date so that you might commence with a gender based discrimination that carries over, does a pure linear regression establish that?
>
> THE WITNESS: I think it could. * * *
>
> THE COURT: [F]or those who were hired before the effective date of Title 7, would not a better approach for determining discrimination in the years that the law was in effect have been not to use total salary, but to use year-by-year changes in increment as the basis of your comparison?
>
> * * * *
>
> [T]he plaintiffs' approach is that after the act became effective, men and women should have been given the same raises, other things being equal, on a gross basis, in other words, you shouldn't take into account the fact that somebody has been discriminated against before and use that as a basis for giving a smaller gross raise even if it is percentage-wise the same.
>
> MR. BUCHWACH: Your Honor, I don't think you are accurately stating the plaintiffs' theory.
>
> THE COURT: What is your theory?

MR. BUCHWACH: Plaintiffs' theory is that people with the same background, experience and the other variables taken into account should be paid the same sums of money.

THE COURT: You go even further. You say that the first year the act went into effect and a 10 percent guideline raise was given to the man, taking him to $22,000, the woman should have been given a $12,000 raise from her $10,000 salary and paid $22,000 that year. *I know you take that position.*

MR. BUCHWACH: Yes, your Honor.

THE COURT: I don't think there is any possible support for it, but you can make an intermediate argument that even under *Evans*, while they weren't compelled to bring her salary up to what it would otherwise have been, it would be inappropriate to use percentage raises that keep perpetuating the past discrepancy and that she was entitled to a $2,000 raise the first year and not a $1,000 raise the first year.

Trial Tr. at 712-16 (emphasis added). It is evident from this exchange that the court was well aware that plaintiffs' central premise was that unless women's salaries were immediately brought up to those of the men on the faculty, the guideline increases women would thereafter receive would never allow them to achieve salary parity. *See also* Trial Tr. at 979-81 (district court indicating that the "interesting comparison" was between pre-act salaries and post-act salaries, and perhaps that "to the extent there has been sex discrimination there has been an effort to eliminate it over the years that has at least been effective with the more recently employed persons"); at

1249 (district court questions witness based on premise that "since [women] had previously been discriminated against and since they were being given guideline raises thereafter, their salaries tended to keep dragging behind" those of men); at 1278 (district court hypothetically accepts "defendant's position that [the law] does not require immediate changes in [the salary of] every woman who had been discriminated against pre-Act", and characterizing as a "fall-back position" plaintiffs' argument that even if immediate equalization is not required, constant percentage increases merely perpetuate past discrimination).

What appears to have occurred at trial is that the court early in the trial rejected plaintiffs' legal argument that Yeshiva had a legal obligation to equalize women's salaries immediately upon application of Title VII to universities, and concluded that so long as women fell no further behind in the post-act period, that was sufficient compliance on the part of Yeshiva. His concern appears to have been that if a male faculty member making $20,000 and a female faculty member making $10,000 both received a 10% raise, in real terms, the male would receive a $2,000 increase, while the woman would receive only $1,000 more in salary, thus not only perpetuating the pre-act disparities, but at least in absolute terms, widening them. *Bazemore*, of course, reveals that the trial judge's initial determination was incorrect; the point here, however, is simply that in reaching that conclusion and focusing as he did on the more narrow question of percentage-v.-absolute salary increases, the district court was in fact dealing with the very issue that it later held had not even been raised until midway through trial.

Our impression is further supported by the district court's evidentiary rulings, which often turned on its perception of the limited relevance of evidence of pre-act salary discrimination. For example, plaintiffs sought to introduce a letter written by Dr. Sam Seifter, while he was chairperson of the biochemistry department, to Dr. Friedman, then dean of AECOM, in 1975, requesting an out-of-guideline increase for a female member of his department, Dr. Blumenfeld. As characterized by defendant's counsel, the letter "reflect[ed] what some chairman [said] * * * Dr. Blumenfeld has been paid lower salaries because of some historical trends." Trial Tr. at 365. Plaintiffs wanted the letter introduced to show the dean's awareness of complaints of salary inequities due to gender; as counsel argued, "I think that's exactly what Dr. Seifter was complaining about because it says in * * * Dr. Seifter's letter: Her relatively low salary is in my judgment related to lower salaries accorded to women *and which have been perpetuated despite regular increments*." *Id.* at 369 (emphasis added).

The district court reserved ruling on the Seifter letter at that point, but later stated (based on the fact that Dr. Blumenfeld apparently received the requested out-of-guideline increase),

> I would point out to you that depending on the view one takes of evidence in other cases, it is conceivable that this is evidence in support of the defense, namely, that there was historical discrimination against women, that it ceased on the day Title 7 became effective to Yeshiva, and that *apparent statistical discrepancies are carryovers which under Evans you are not required to remedy.*

Trial Tr. at 633 (emphasis added). At other points in the trial, the district court indicated that inequities that may have existed prior to 1974, the pre-limitations period, could be shown only to demonstrate "background", and that such evidence was not directly relevant as to the remedial period. As we discuss more fully below, these rulings were erroneous in light of *Bazemore*, but, erroneous or not, they demonstrate that the thinking of the district court plainly was focused on the idea of isolating pre-act discrimination. That the district court was aware of the nature of Sobel's "disparate impact" theory is further made plain by its statement to plaintiffs' expert, Dr. Ashenfelter:

> [O]ne [possible conclusion] is that a substantial part of what you detect—what you have determined to be sex discrimination is directed at those women employed before March 24, 1972, and to that extent it brings into focus some of the different legal theories we have discussed concerning carryover effects, corrections of them, and what-have-you * * *.

Trial Tr. at 980-81. Thus, it is evident that plaintiffs' "disparate impact" claim, in substance, was before the district court before trial, and was a major focus of the court's thinking during trial.

B. *The Legal Characterization of Sobel's Claim.*

The district court's finding that Sobel's disparate impact claim was not timely raised depended, of course, on its ruling that what it perceived her to be arguing was, in fact, a disparate impact claim. We disagree. This was a mischaracterization of the nature of Sobel's *Bazemore*-style allegation and erroneously focused on salary increases under the guideline system rather than on the

initial failure, when Title VII was first applied to universities, to raise women's salaries to the same levels enjoyed by comparably situated men.

As we have already discussed, Sobel's claim that Yeshiva's guideline system of salary increases perpetuated (and, to some degree, exacerbated) pre-act salary discrimination was before the district court prior to and throughout the trial. This claim is on all fours with the claim recognized by the Supreme Court in *Bazemore*. *See* 106 S. Ct. at 3004-06. *Bazemore* involved an allegation of discrimination on the basis of race in salaries in the North Carolina Agricultural Extension Service. The plaintiffs alleged that initial salaries paid to black employees were lower than those paid to whites, and that such discrimination was perpetuated by the defendant's system of increasing salaries, which in some ways was remarkably similar to Yeshiva's guideline system. *See Bazemore v. Friday*, 751 F.2d 662, 668, 671 (4th Cir. 1984) (portion of salary increases based on across-the-board and percentage increases given nondiscriminatorily; remainder based on subjective merit a potential source of discrimination). The plaintiffs argued "that the pre-Act discriminatory difference in salaries should have been affirmatively eliminated but has not." *Id.* at 670. That was precisely plaintiffs' claim here.

Such a claim is not properly characterized solely as one of disparate impact. A classic disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or a height requirement, for its differential impact on the hiring or salary of a particular group. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *Dothard*, 433 U.S. at 329; *Clady v. County of Los Angeles*, 770 F.2d 1421, 1427 (9th Cir. 1985), *cert. denied*,

475 U.S. 1109 (1986). Never directly questioned in a disparate impact case—probably because it is not an essential element of a plaintiff's *prima facie* case—is *why* the practice in question disproportionately affects the group. If the issue arises, it does so in the context of the employer's burden, in light of the plaintiff's *prima facie* showing, to show that "any given requirement [having a disparate impact] must have a manifest relationship to the employment in question." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). If, for example, a test of physical skills such as speed, strength, and stamina disproportionately disqualifies women from employment as firefighters, the employer would attempt to demonstrate that the reason women were failing the test more often than men was because they lack those attributes, and then that such qualities were job-related. *See Berkman v. City of New York*, 812 F.2d 52, 59-60 (2d Cir.), *cert. denied*, 108 S. Ct. 146 (1987).

In this case, the reason why the facially neutral guideline system had a "disproportionate" impact on women—indeed, the only reason such a system of across-the-board salary increases could ever have a disparate impact—was because of pre-act discrimination, either in setting initial salaries or, at some point, in increasing them discriminatorily. The disparity in impact of the facially neutral guideline policy resulted from earlier disparate treatment, both pre-act and pre-statute of limitations. The neutral mechanism, far from being the discriminatory act, is merely the means by which the pre-act and pre-limitations disparate treatment is carried forward into the actionable time frame.

Here, the adherence by Yeshiva to the guideline system was not the violation claimed by Sobel; she, like the

Bazemore plaintiffs, was challenging the failure to equalize salaries, separate and apart from the operation of the guideline system. *See Sobel I*, 566 F. Supp. at 1186 n.54 ("[I]f [plaintiffs] were simply granted a one-time adjustment to make the average of their salaries equal to that of their male counterparts, they would be perfectly content to let the guideline system continue operating just as it has for years."). Of course, the two are in practice two sides of the same coin; adherence to the guideline system effectively precluded giving the one-time increases that would have equalized women's salaries.

While it is true that in a disparate treatment case a plaintiff ordinarily must show discriminatory motive, a showing unnecessary in a disparate impact case, *see Dothard*, 433 U.S. at 329; *Williams v. Colorado Springs, Colo. Sch. Dist.*, 641 F.2d 835, 839 (10th Cir. 1981), this distinction is not relevant to a *Bazemore* claim. While Sobel probably could not show that Yeshiva's adherence to the guideline system was done with discriminatory motive, that adherence was, as we have noted, only the manner in which the disparities were perpetuated; the violation was Yeshiva's failure to remedy the disparities. The failure to bring women's salaries up to par with those of men the day Title VII applied to Yeshiva is the sort of pattern and practice that would sustain a disparate treatment claim, even absent explicit proof of discriminatory motive. *See International B'Hood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

C. *The Treatment of Plaintiffs' Claim After Bazemore.*

Even if we were to agree that the district court was initially correct in treating as procedurally barred plain-

tiffs' claim of perpetuation of salary disparities, we would nevertheless conclude that in light of *Bazemore* it was error to continue to do so on our remand to the district court.

It is beyond question that a pending case must be decided under the law in effect at the time it is decided, as opposed to that governing when the case was tried, if the law changes in the interim. *Thorpe v. Housing Authority*, 393 U.S. 268, 281-82 (1969) ("The general rule • • • is that an appellate court must apply the law in effect at the time it renders its decision. • • • This same reasoning has been applied where the change was constitutional, statutory, or judicial." (footnotes omitted)); *Spirt v. Teachers Ins. and Annuity Ass'n*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984); *National Auto Brokers v. General Motors Corp.*, 572 F.2d 953, 960 & n.11 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

In light of *Bazemore*, various of the district court's rulings became erroneous. The most obvious error (with hindsight) was that the court discounted the weight to be accorded plaintiffs' regression studies in part because plaintiffs had not eliminated the effects of pre-act salary discrimination. While this was not the only basis on which the trial judge rejected plaintiffs' experts' conclusions, it is clear from his opinion, as well as from as his intense questioning of plaintiffs' experts on this very issue, that this was a critical element in his mind.

Perhaps as important, the district court's concentration on the discrimination that directly could be traced to the post-act period prevented it from focusing on that portion of the data that was the strongest part of plaintiffs' proof—the salary disparities among pre-1972 hires. Indeed, the court *discounted* the strength of plaintiffs' data

for the entire class because it *included* pre-1972 hires, whose lower salaries the court felt resulted from pre-1972, and therefore not actionable, salary decisions.

Moreover, the court's treatment of much of plaintiffs' anecdotal evidence of discrimination by Yeshiva was affected by its secondary focus on acts occurring before 1972. The court criticized plaintiffs for the paucity of anecdotal evidence, 566 F. Supp. at 1184-86, but most of what they tried to introduce related to pre-act events, and the district court either refused to admit it at all, Trial Tr. at 382 (were court to accept plaintiffs' "continuing effects" theory, "there would be a good deal more admissibility" to rejected letter written by department chairperson in 1976 indicating past gender inequities had not been resolved), or allowed it in only as "background", Trial Tr. at 251-59 (accepting only for limited purposes document relating to recommendations for out-of-guideline increases, allegedly to correct sex disparities, made prior to limitations period). In *Sobel I*, the court said that anecdotal evidence dating from before December 1974, the limitations date, was "entitled to little weight and constitute[d] only relevant background evidence." 566 F. Supp. at 1185. So limiting the presentation of plaintiffs' case might well have been appropriate before the Supreme Court decided *Bazemore*, *see Bazemore*, 751 F.2d at 672 ("pre-Act discrimination" admissible "to show the general background of the case, or intent, or to support an inference that such discrimination continued"), but the Supreme Court's reversal of the fourth circuit in *Bazemore* makes such evidence directly probative as supporting the claim that the disparities evidenced in the post-1972 salaries of pre-1972 hires were due to discrimination against them.

In short, despite the length of the trial, of the record, of the exhibit list, and of the district court's opinion, plaintiffs have not received a full and fair opportunity to have their case heard in light of the new learning contributed by *Bazemore*. The unusual nature of the *Bazemore* claim makes it appropriate to allow plaintiffs even now an opportunity to construct a "continuing effects" claim, even if Sobel had not attempted to do so in the first trial. Since she did in fact try to make out such a case, and since defendant was well aware of what it was that plaintiffs were seeking to do, there is no imaginable unfairness to Yeshiva in allowing plaintiffs to establish what they tried to establish at the first trial, and might well have been able to establish but for the rulings of the district court made erroneous by *Bazemore*.

It would not have been surprising if plaintiffs had failed to focus on the theory that pre-1972 disparities in salary were carried over into the post-act (and, later, into the limitations) period, since the district court, and the weight of authority, indicated that the continuing effects theory was closed to plaintiffs by *United Air Lines, Inc. v. Evans*, 431 U.S. 553. Perhaps these plaintiffs may be considered fortunate that *Bazemore* came down just in time for it to be applied to their case, but good fortune is sometimes a litigant's best ally.

We expected with our earlier remand in this case that the district court would reopen the case for the admission of additional evidence, including some that originally was excluded, and for reevaluation of the entire record as supplemented in order to consider the related questions of whether there was pre-act discrimination and whether it was, in fact, carried over into the actionable period. *Bazemore* gave plaintiffs the right to such an inquiry, a

right denied to them by the district court's cursory treatment of the case on remand.

II. *Alternative Bases for the District Court's Decision.*

The district court appears to have offered at least two other grounds for dismissal of plaintiffs' complaint. First, it distinguished *Bazemore* on the ground that it involved discrimination against blacks, while here the plaintiff class is composed of women. Second, in its initial decision, the court held that plaintiffs had not established their "disparate impact" claim. Neither factor is sufficient to avoid a full reevaluation of the case under *Bazemore*.

A. *The Applicability of Bazemore to Gender Discrimination.*

In its opinion on remand, the district court drew a distinction between race and gender discrimination, on the ground that racial discrimination was illegal even before Title VII, while gender discrimination claims are "solely a product of Title VII, and claims in that regard did not exist for pre-Act periods." *Sobel III*, 656 F. Supp. at 589 n.5. He implied from this that employers ought not be held liable for the consequences of pre-act discrimination not illegal when made.

We need not tarry long on this erroneous conclusion, since it rests on a misunderstanding of *Bazemore*. The Supreme Court did not allow an employer to be held liable for its pre-act decisions; indeed, *Bazemore* specifically stated that there is no back-pay liability for the discriminatory paychecks received by blacks before Title VII became effective to the North Carolina Agricultural Extension Service. *Bazemore*, 106 S. Ct. at 3006.

What the employer is liable for is continuing its pre-act discrimination into the post-act period. It violates Title VII to pay lesser salaries to protected employees during the time the statute applies to the employer, and in determining whether such a violation occurred, the prior character of the pre-act discrimination—whether it was illegal apart from Title VII—is irrelevant. *Bazemore* held that the treatment of blacks *after* Title VII was applied to their employer can constitute a Title VII violation, even if the conduct began before the effective date. There is no reason that logic should not apply with equal force to gender discrimination. *Cf. City of Los Angeles v. Manhart*, 435 U.S. 702, 709 (1978) (equating claims of racial and gender discrimination).

B. *The Viability of Plaintiffs' "Continuing Effects" Claim.*

In *Sobel I*, the district court offered alternative reasons for rejecting plaintiffs' "disparate impact" theory. We have already addressed the first, the alleged procedural bar arising from the timing of plaintiffs' assertion of the claim. The second was that plaintiffs had been unsuccessful in proving the claim. As the district judge himself intimated in *Sobel III*, this conclusion cannot stand in the face of *Bazemore*.

It appears to us that even as the record stands now, without the supplementation we had expected would occur on the remand, there is considerable evidence to support a *Bazemore*-type violation. Table 3 of the district court's first opinion, 566 F. Supp. at 1177, demonstrates that when only plaintiffs' variables are used in a regression analysis, and using the data agreed upon by the parties, the analysis produces a statistically significant sex

coefficient among pre-1972 hires for every year from 1974 to 1979, whether the computation is done on salary or a logarithm of salary, except 1976, where the coefficient for salary is 1.98, just under the 2.0 level of statistical significance. Table 4 shows that even when some of defendants' suggested variables are included, the statistical significance is maintained for 1977-1979 when plaintiffs' data is used, and for 1976 and 1977 when the agreed-upon data is used.

The district court plainly found this data important in its decision, since it discussed at length as a weakness in plaintiffs' case the fact that they did not "analyze the extent to which salary differentials may have been the consequence of discriminatory acts that occurred prior to the date that Title VII became applicable to universities", *id.* at 1182, and made much of the statement by plaintiffs' expert, Dr. Ashenfelter, that, when that analysis was later performed, it "revealed no statistically significant proof of sexual discrimination during the relevant time period." *Id.*

We are frankly skeptical of defendant's claim now that there was no discrimination even before Title VII was applied to Yeshiva. The district court discounted plaintiffs' showing of salary disparities in the actionable period because it felt whatever disparities had been shown were due to pre-act events. If that was true when Yeshiva stood to benefit because *Evans* and its progeny appeared to insulate it from liability for those pre-act events, it is no less true now that that view of *Evans* has been discredited by *Bazemore*. Fact-finding is not a function of which side will benefit depending upon how the relevant law may treat a given fact.

While it is true that Yeshiva has always maintained that there is no evidence even of pre-act discrimination, and has relied only as a secondary position on the idea that if there was discrimination it must have been pre-1972, the district court appears to have accepted that secondary position as at least part of the true explanation for the current (i.e., 1974-1979) disparities. The district court's comments during trial reflect this, *see, e.g.*, Trial Tr. at 980-81 ("From [the increases in women's relative pay] two possible conclusions can be drawn, and one is that a substantial part of what you detect—what you have determined to be sex discrimination is directed at those women employed before March 24, 1972 * * *."), and its opinion confirms it. *See Sobel I*, 566 F. Supp. at 1188 ("The original salaries of those hired before March 24, 1972, did not have to meet the standards established under Title VII. * * * Hence, the plaintiffs are placed in the awkward position of arguing that past initial salaries which were allegedly discriminatory but certainly legal, and present annual increases that have been shown to be fair and non-discriminatory somehow add up to a 'present violation' of Title VII."). While the district court was appropriately cautious about making an unnecessary (given its view of the pre-*Bazemore* law) determination of whether plaintiffs' allegations of pre-act salary discrimination had been proven, such a determination is now rendered necessary by *Bazemore*.

Our conclusion that plaintiffs' allegation of pre-act salary discrimination being carried over into post-act salary disparities must be considered anew is buttressed by the district court's opinion on remand. The district court stated, "Had we relied solely on *Evans* in dismissing the plaintiffs' disparate impact claim on the merits, our

prior ruling might require reconsideration." *Sobel III*, 656 F. Supp. at 590. Since we have already rejected the alternative ground (the procedural bar) upon which the district court's dismissal rested, we agree that the prior ruling "require[s] reconsideration." This is true even though the trial judge indicated in his opinion that "the evidence showed that [lower salaries initially paid to some female faculty members hired prior to 1972] probably resulted not from discrimination, but from several gender-neutral factors." *Id.* at 589.

Such so-called "gender-neutral factors" pointed to by the district court are, however, little more than inferences, built on speculation and stereotypes, unsupported by the record. In a footnote from *Sobel I*—repeated in *Sobel III*—the district court found that much of the pre-act disparity was due to the "accepted sociological fact that [in the 1960s] the percentage of men who were the sole wage earners for families with children exceeded the percentage of married women who were such." *Sobel I*, 566 F. Supp. at 1184 n.49. According to the court, it "was considered not only socially acceptable but also socially desirable" to favor sole heads of households. *Sobel III*, 656 F. Supp. at 590 n.8.

The problems with this approach to fact-finding are many. First, Yeshiva introduced no evidence—none—either that such a policy was in effect at AECOM, even informally, or that the "accepted sociological fact" that men were more often sole wage earners was true on the AECOM faculty. There was some testimony that, with AECOM in some financial difficulty in the late 1960s, salary increases tended to go to those who complained loudest and longest. Trial Tr. at 1251-52. It was the court, however, that inferred from that that sole wage earners

were more likely to complain and therefore to get the raises, and then inferred further that this was likely to favor men because the "accepted sociological fact" was true at AECOM, and finally that this difference explained the pre-1972 salary disparities. We find this chain of inferences too weak to support a valid conclusion.

Equally important, there is no evidence in the record indicating how such a "policy"—if it existed—was implemented, and whether it was "gender-neutral". For example, assuming that some women on the AECOM faculty were sole wage earners, did Yeshiva pay them more than their female colleagues not so situated? Were there demonstrable differences between male faculty members based on their status as the head of a household? If such a "gender-neutral" policy existed, and if it had a disproportionate effect on women, Yeshiva presumably would have to show that this policy was job-related, a showing we doubt it could make. In short, the supposedly "gender-neutral" factor found by the district court rested on a stereotyped notion of male and female characteristics (in this instance, "sociological" characteristics) the application of which to this case simply had no basis in the record, and which almost certainly violated Title VII if it continued to affect women after Title VII was applied to Yeshiva. *Cf. Manhart*, 435 U.S. at 707 ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions * * * are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.").

In short, the district court's explanations for disregarding pre-act salary disparities simply are not supported by

the evidence, which to this point is incomplete on the crucial question of pre-1972 salaries at Yeshiva. We need not speculate, as the district court did, *see Sobel III*, 656 F. Supp. at 590-91 n.10 ("In view of the evidence presented, we question whether such a case could ever have been successful."), as to the likelihood of plaintiffs' succeeding in a new trial. They are entitled to try.

III. *Matters For Administration on Remand.*

As we have indicated, we are concerned about the long history this case has thus far written. In the hope that we can facilitate the closing of this chapter in the lives of these litigants, of the southern district, and of this court, we offer the following suggestions for the remand.

A. *The Weight to be Accorded Plaintiffs' Regressions.*

Part of our initial remand in this case was for the purpose of reconsidering the probative value of plaintiffs' regression analyses in light of *Bazemore*. *See Sobel II*, 797 F.2d at 1479. While we agree with the district court's determination in *Sobel III* that it was correct in *Sobel I* insofar as it treated the flaws in plaintiffs' regressions as going to the weight rather than their admissibility, *see Bazemore*, 106 S. Ct. at 3009, the court did not, in *Sobel I*, apply the correct standard in evaluating defendant's objections to the regressions.

We read *Bazemore* to require a defendant challenging the validity of a multiple regression analysis to make a showing that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis. *See Bazemore*, 106 S. Ct. at 3010-11 n.14 ("[Defendants'] strategy at trial was to declare simply that many factors go into making up an individual

employee's salary; they made no attempt * * * to demonstrate that when these factors were properly organized and accounted for there was no significant disparity between the salaries of blacks and whites."); *see also Palmer v. Schultz*, 815 F.2d 84, 101 (D.C. Cir. 1987) ("Implicit in the *Bazemore* holding is the principle that a mere conjecture or assertion on the defendant's part that some missing factor would explain the existing disparities * * * generally cannot defeat the inference of discrimination created by plaintiffs' statistics.").

Here, one of Yeshiva's primary attacks on plaintiffs' proof was "the plaintiffs' use of inadequate proxies for productivity." *Sobel I*, 566 F. Supp. at 1182. Yeshiva contended that Sobel had left out several important variables that would represent productivity and, implicitly, reduce the sex coefficient by explaining some of the disparity in salary which plaintiffs' experts had attributed to gender discrimination.

With one exception—rank—which will be discussed shortly, Yeshiva did not show that, with these factors accounted for, the apparent gender disparity was reduced. Yeshiva's experts simply criticized plaintiffs' failure to include them, offering no reason, in evidence or analysis, for concluding that they correlated with sex and therefore were likely to affect the sex coefficient. Of course, Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable, but such an attack should be specific and make a showing of relevance for each particular variable it contends plaintiffs ought to include. Ideally, Yeshiva would seek to do so by offering its own regression that includes the variable it contends improperly was omitted. At the first trial, the single regression Yeshiva offered was

packed with all of the factors it contended plaintiffs should have included, but it provided the court with no chance to sift through the various factors to determine the weight to be assigned to any of them.

As contained in Yeshiva's experts' report, the failure by plaintiffs' adequately to reflect productivity caused an "underadjustment bias" whereby the disparities based on productivity were understated, and the disparities attributed to gender were correspondingly overstated. The report stated:

> *[I]t is a mathematical fact that if in a multiple regression analysis salary is regressed on proxies that imperfectly reflect qualifications and productivity, and if women generally have lower proxy values than men, then there will be an underadjustment for differences in true productivity and a resulting overstatement of the sex coefficient* * * *.

Defendant's Statistical Report, Trial Ex. 745, at 69-70 (emphasis in original). The key to this argument, of course, is that "women generally have lower proxy values than men". If women and men have equal measures of true productivity, then having imperfect variables for productivity would cause no underadjustment.

Bazemore, as applied here, requires Yeshiva to show that the failure to include a proxy causes an actual underadjustment. Yeshiva's experts concluded that Sobel's regressions contained an "underadjustment bias" simply because men scored higher on the included variables. *See id.* at 74 n.*. Insofar as Yeshiva argued that simply because men "scored" higher the imperfection of the included variables itself proved that the regression underadjusted for productivity, the argument is unpersua-

sive. Men might have scored even higher had the variables perfectly reflected productivity, and this would have explained even more of the apparent gender disparity. But it is equally possible that the imperfection had the opposite effect; that *women* would have scored higher if the proxies were more accurate. On the present record, there is no way to tell which gender was disadvantaged by the imperfections.

Put another way, all that is known about the proxies used by plaintiffs in their regression is that they are not perfect measures of productivity, and that insofar as they do measure productivity they show that men on the AECOM faculty possess the attributes tied to productivity (e.g., experience) in greater measure. What is not known is whether variables that exactly measured productivity would show the same advantage for men (and thus would explain the same portion of the raw gender disparity as the imperfect proxies), a lesser advantage for men (and therefore explain less of the gender discrepancy), or a larger advantage. In short, the simple fact of imperfection, without more, does not establish that plaintiffs' model suffers from underadjustment, even though men score higher on the proxies.

If the argument is instead that the excluded variables are likely to favor men simply because the included ones do so, and that therefore failing to include them is what causes underadjustment, Yeshiva still must show that the former ought to have been included on a stronger basis than simply that they favor men; they must still be actual determinants of salary, or at least adequate proxies for productivity. Moreover, they must be shown not to be multicollinear with those variables already included, and for that matter with each other, and also not themselves

tainted by sex discrimination. In short, if Yeshiva seeks to show that plaintiffs' regression analysis suffers from failure appropriately to adjust raw salary disparities for differences in productivity, it must actually demonstrate that failure. It cannot rely on assumptions about imperfections inherent in productivity proxies, nor can it simply propose alternative variables without justifying their inclusion.

As to rank, we conclude that it was appropriately included by the district court. Plaintiffs concede that rank does correlate with sex, and concede further that rank does at least loosely reflect productivity. They argue only that its inclusion may serve to mask sex discrimination because promotions in rank might not have been gender-neutral. However, the district court concluded that "promotions in rank * * * were in fact based on merit and were not contaminated by elements of sexual discrimination", *Sobel I*, 566 F. Supp. at 1180, and in light of the fact that plaintiffs abandoned before trial any claim of gender discrimination in promotions, that finding is not clearly erroneous. Thus, on remand, rank should be included as a variable in any regression analysis.

We also reject Yeshiva's attack on the multiple regression technique as a general matter when applied to the complex and diverse context of a medical school faculty. While it is true that the relative uniqueness of each faculty member, and the subjectivity of many of the determinants of salary, make a regression analysis difficult, these problems are not insurmountable. Indeed, as a device designed to sift through various factors in order to assess as accurately as possible the influence of any one of them, the multiple regression analysis is the accepted means for performing this difficult task. *See Bazemore*, 106 S. Ct.

at 3008-09 (accepting plaintiffs' case which "relied heavily on multiple regression analyses" and saying that a "plaintiff in a Title VII suit need not prove discrimination with scientific certainty"). Accepting Yeshiva's contention would have the practical effect of insulating universities from charges of discrimination in the setting of faculty salaries, since such claims may well be virtually unprovable by any other means.

In the place of multiple regressions, Yeshiva sought to introduce the so-called "urn model", an analytic tool remarkable only for its extremely limited usefulness. In an effort to show that the salary disparity identified by plaintiffs as being due to gender could in fact occur at random, Yeshiva's experts conducted the following procedure: slips containing the salaries of all AECOM faculty members were placed in an "urn", and a number equaling the number of women on the faculty was drawn at random. This, in effect, formed a "control" group that could be compared to the female faculty members, since the random selection was by definition nondiscriminatory. If the average salary of the "control" group, when compared to the salary slips left in the urn, approximated the disparity that existed between women and men, it would tend to show that that disparity could have occurred at random.

The advantage to this approach is its simplicity, since "its use did not depend on the same underlying assumptions upon which the plaintiffs' model rested, and which were so much in doubt." *Sobel I*, 566 F. Supp. at 1183 n.42. Because of this, the court found that "the urn model provided a very appropriate test given Einstein's complex organization and the diffuse factors affecting salaries." *Id.*

All the urn model tends to show, however, is that a given salary disparity *could* occur at random. It does not show that this disparity *did* occur at random. It is implicit in the concept of a multiple regression that the importance it attributes to a variable, such as gender, is susceptible to varying degrees of certainty; except in the most extreme cases, there is always the possibility that any difference attributed to a given factor will actually be the result of chance. The chance that random selection will produce the same disparity is reflected in the statistical significance of the disparity—the greater the disparity, the less the chance it occurred at random, and the greater the statistical significance of the sex coefficient.

Thus, the value of the urn model is limited to graphically illustrating the uncertainty inherent in any multiple regression analysis. Ultimately, the simplicity that is its asset also severely limits its probative value.

In sum, on remand the district court should discount the weight to be accorded plaintiffs' regression analysis because of the failure to include an explanatory variable only upon a showing by the defendant that the missing variable is a determinant of salary and correlates with sex, and thus is likely to cause a demonstrable, rather than an assumed, underadjustment bias. Any regressions should include rank as a variable, while inclusion of any other contested variables will depend on the facts relevant to that variable. The failure, by either side, to include a relevant variable (or the inclusion of an irrelevant or multicollinear variable) will go to the probative value of the analysis, not its admissibility.

B. *The Focus on Pre-1972 Hires.*

A major focus of the district court on retrial should be on the disparity affecting female faculty members hired before 1972. But we do not foreclose plaintiffs from seeking to demonstrate salary disparities across the entire class of female AECOM faculty, if that still seems appropriate despite the trial judge's view that "the appearance of discrimination in salaries during the relevant time period resulted from lower salaries paid to female faculty members who had been hired prior to 1972." *Id.* at 1182.

Yeshiva, of course, may attempt to show that there was no salary disparity, even among pre-1972 hires, either before 1972 or since. It may also attempt to demonstrate that even if there was a pre-act disparity, it did not carry over into the actionable time period, after December 1974. To fully succeed, however, such a showing must be made not only as to the entire class, but also as to the pre-1972 hires.

To determine whether a valid *Bazemore* claim exists, the pre-1972 hires must be separately analyzed from the post-1972 group, because a study of the entire class, both pre- and post-1972 hires, would tend to mask any continuing effects of pre-act discrimination. Should the district court find that discrimination against pre-act hires explains the apparent general disparity between men and women, relief could accordingly be targeted to the pre-1972 hires.

C. *Remand to a Different District Judge.*

We reluctantly conclude that it is necessary to remand the case to a different district judge. We frankly are disturbed by the manner in which the district court

treated this case on our initial remand. It is clear that, in light of *Bazemore*, the first trial was replete with error, and that a fresh look at the evidence was necessary on remand, along with an opportunity to supplement the record with new evidence relating to the pre-act period and its post-1974 consequences. We intend no criticism of the trial judge's handling of the first trial; he conducted a thorough and searching inquiry after what must have seemed endless discovery, and made detailed findings in his opinion in *Sobel I*. It was only after *Bazemore* that his efforts to that point became inadequate.

Nevertheless, *Bazemore* exists, and we are concerned over what appears to be an unwillingness on the first remand to deal with its implications and the remedial obligations it may impose on Yeshiva. Perhaps this is understandable—the case began in 1975, the trial occurred in the fall of 1982, and it is natural to consider such events as part of the past and wish to avoid dealing with them afresh—but such an inclination leads us to doubt the district judge's receptivity to the case plaintiffs are entitled under *Bazemore* to try to make. The finding of a "procedural bar" to plaintiffs' continuing effects claim is so contrary to the record in this case that it suggests a strong desire to escape dealing with the case again, and such is not proper treatment for a remand order.

While remanding to a different district judge is an "extraordinary remedy * * * [to] be reserved for the extraordinary case", *United States v. Robin*, 545 F.2d 775, 784 (2d Cir. 1976) (Timbers, J., dissenting), we believe that this case is, indeed, extraordinary. *Cf. United States v. Spears*, 827 F.2d 705, 709 (11th Cir. 1987) (where district judge apparently evidenced bias against govern-

ment, reassignment was ordered); *In re Matter of Yagman*, 796 F.2d 1165, 1188 (9th Cir. 1986) (even where circuit court rejects contention district court was biased as ground for reversal, and does not doubt district judge's "ability to act fairly", remand to new judge "necessary to preserve the appearance of justice"); *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1523 (9th Cir. 1985) ("A district court judge's adamance in making an erroneous ruling may justify remanding the case to a different judge.").

CONCLUSION

To summarize, the case is remanded for a retrial which shall include full consideration of plaintiffs' claim that there were pre-1972 salary disparities carried over into the post-1974 limitations period because of Yeshiva's failure to equalize salaries upon its being covered by Title VII, and reconsideration of plaintiffs' claims for the entire class in light of all the evidence, with their regression analyses to be evaluated in accordance with *Bazemore's* principles. There should be a reasonable period for additional discovery, if needed. We suggest that in the interest of economy the parties and the court cooperate in stipulating as to what evidence introduced at the first trial may be deemed part of the record on the retrial, to be considered for whatever probative value it may have in light of *Bazemore* and this opinion.

The judgment of the district court is reversed and the case is remanded to the district court for further proceedings.

No. 87-2056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

YESHIVA UNIVERSITY,

Petitioner,

— VS. —

EDNA H. SOBEL, M.D., on behalf of herself and other professional faculty members employed by the defendant, YESHIVA UNIVERSITY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Petitioner, Yeshiva University ("Yeshiva"), submits this brief in reply to Respondents Brief in Opposition to Petition for Writ of *Certiorari* to the United States Court of Appeals for the Second Circuit ("Respondents' Brief"). Respondents minimize the glaring conflict between the opinion below and decisions of this Court and of other Courts of Appeals by ignoring that opinion's fundamental holdings.

REPLY TO RESPONDENTS' ARGUMENTS

I

THE CLEAR EFFECT OF THE COURT OF APPEALS' DECISION IS TO SHIFT THE BURDEN OF PROOF TO TITLE VII DEFENDANTS AND TO DENY DISTRICT COURTS THE DISCRETION TO WEIGH THE EVIDENTIARY VALUE OF REGRESSIONS WHICH OMIT SIGNIFICANT QUALITATIVE FACTORS

Respondents erroneously argue that in *Sobel IV* the Court of Appeals did not impose on Yeshiva the burden of proving the invalidity or unreliability of their regression model. For support, respondents misquote a passage from *Sobel IV* in which the Court of Appeals stated that ". . .Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable. . . ." (Respondents' Brief at 7-8.)[1] The text which precedes this passage contradicts

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[1] Respondents' Brief omits portions of the text they purport to quote from *Sobel IV*. The quoted text at pages 7-8 of Respondents' Brief should read:

> . . . .Yeshiva is free on retrial to seek to show that any regression offered by plaintiffs is inadequate for lack of a given variable, but such an attack should be specific and make a showing of relevance for each particular variable it contends *plaintiffs ought to include. Ideally, Yeshiva would seek to do so by offering its own regression that includes the variable it contends* improperly *was* omitted.

(A-28) (emphasis supplied to show omitted language).

The omitted text suggests that Yeshiva's rebuttal to respondents' statistics should be in the form of a regression analysis that includes each variable which respondents improperly omitted. (*Id.*) Because many of the variables respondents omitted are non-quantifiable, Yeshiva cannot possibly do what the Court of Appeals suggests is the proper approach. Later in its decision, the Court of Appeals essentially bars any other approach by holding that Yeshiva must prove statistically that respondents' showing of a salary disparity would be weakened by inclusion of any omitted variable. (A-27-28.)

respondents' position, however, stating that where a plaintiff's regression analysis omits a variable which is a determinant of pay, it is the employer's burden to prove that if the variable were included "the apparent gender disparity [would be] reduced." (A-28.) This shift in the burden of proof is plainly spelled out at several points in *Sobel IV*:

> We read *Bazemore [v. Friday] to require a defendant* challenging the validity of a multiple regression analysis *to make a showing* that the factors it contends ought to have been included would weaken the showing of a salary disparity made by the analysis.

(A-27-28) (emphasis supplied).

> *Bazemore...requires Yeshiva to show* that the failure to include a proxy causes an actual underadjustment.

(A-29) (emphasis supplied).

> ...the district court should discount the weight to be accorded plaintiffs' regression analysis because of the failure to include an explanatory variable *only upon a showing by the defendant* that the missing variable is a determinant of salary and correlates with sex....

(A-32) (emphasis supplied). Such language is consistent only with the allocation of a burden of proof and a shift in the risk of nonpersuasion to the defendant. *Watson v. Fort Worth Bank and Trust ("Watson")*, __U.S.__, 56 U.S.L.W. 4922, 4928 (1988), and cases quoted from therein (Justice Blackmun concurring in part).

A plaintiff's introduction of statistics showing a gender-based disparity does not, however, serve to shift the burden of proof to the defendant. As recently stated by a plurality of this Court in *Watson*, shifting the burden of proof to the defendant to refute a statistical analysis offered by the plaintiff would improperly raise a presumption in the plaintiff's favor: "...courts or defendants [are not] obliged to assume that plaintiffs' statistical evidence is reliable." 56 U.S.L.W. at 4927 (plurality opinion). The Court of Appeals' opinion in *Sobel IV* therefore stands in

apparent conflict with the evidentiary standards set forth by the *Watson* plurality.

In *Watson*, seven Justices expressed general agreement with the proposition that in a disparate treatment case the plaintiff bears the burden of proof at all times.[2] *Id.* at 4924, 4929. The Court was divided, however, on the evidentiary standards applicable to a disparate impact case involving the use of subjective selection practices. *Id.* at 4926-27. Since in *Sobel IV*, the Court of Appeals dissolved the accepted distinction between disparate treatment and disparate impact, stating that "this distinction is not relevant to a *Bazemore* claim" (A-19), it is unclear what impact, if any, *Watson* has had on the issues raised in this case.[3]

Justice O'Connor's plurality opinion, in which three Justices joined, emphasized that applying disparate impact theory to subjective job criteria would not have a chilling effect on legitimate business practices because of the "high standards of proof" required of plaintiffs. 56 U.S.L.W. at 4948.[4] The plurality noted first that the plaintiff's burden "goes beyond the need

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[2] Justice Stevens concurred in the judgment but challenged the adequacy of the factual context for the plurality's elaboration of evidentiary standards. *Watson*, 56 U.S.L.W. at 4931 (Justice Stevens concurring). That concern does not apply to the present case in which the factual context is well established.

[3] Without elucidating its rationale, the Court of Appeals fashioned a hybrid claim which is "not properly characterized solely as one of disparate impact", nor solely disparate treatment. (A-18.) Perhaps this notion of a hybrid "*Bazemore* claim" led the Court of Appeals to deviate from the rule that in a disparate treatment case the burden of proof never shifts to the defendant. Accordingly, in order to answer the first question presented in Yeshiva's petition, the Court may wish to reach as a threshold matter the nature of respondents' claim, before determining what evidentiary standards apply. Thus, the issue raised and left undecided in *Watson* — in what kind of case and on what set of facts should the burden of proof be shifted to the defendant (if ever) — arises again here.

[4] In the plurality's view, the high level of proof required of plaintiffs in such cases is consistent with the Congressional intent that employers not be required

(Footnote continued)

to show that there are statistical disparities ...." *Id.* at 4926. The plurality further held that the plaintiff's statistics are not presumed to be reliable (*id.* at 4927), that the defendant has wide latitude in challenging the plaintiff's statistics (*id.*), that the defendant is not required to produce particular types of evidence in rebuttal (*id.* at 4927-28), and that the ultimate burden of proof remains with the plaintiff at all times (*id.* at 4927).

The plurality also held that in judging whether the plaintiff's evidence is significant or substantial enough to establish a *prima facie* case, the District Court must consider the employer's case, which can be quite broad: the employer may adduce countervailing evidence, impeach the reliability of the plaintiff's statistical evidence, or disparage by argument the probative weight to be accorded the plaintiff's evidence by showing, for instance, that the data are incomplete or the statistical techniques inadequate. *Watson*, 56 U.S.L.W. at 4927. Quoting from the concurring opinion of Chief Justice Rehnquist in *Dothard v. Rawlinson*, 433 U.S. 321, 338-39 (1977), the plurality affirmed that:

> '[i]f the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.'

56 U.S.L.W. at 4927.

In *Sobel IV*, however, the Court of Appeals, interpreting this Court's decision in *Bazemore v. Friday* ("*Bazemore*"), 478 U.S. 385 (1986), criticized Yeshiva for "simply" offering evidence

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to adopt quotas or engage in preferential treatment. 56 U.S.L.W. at 4926. This Congressional mandate is equally applicable to disparate treatment analysis and, accordingly, the *Watson* plurality's standard of proof analysis would seem to apply to statistical proof of the subjective employment decisions at issue in the case at bar.

which included: statistical analyses "packed with all of the [quantifiable] factors it contended plaintiffs should have included...." (A-28); the testimony of fact and expert witnesses that respondents' statistical analyses omitted principal determinants of pay; econometric testimony that the omission of variables to reflect these pay determinants had the likely effect of inflating the sex coefficient; testimony that objective statistical tests had shown respondents' studies to be utterly unreliable; evidence that respondents' studies were based upon incomplete and inaccurate data; detailed and lengthy reports by four experts criticizing respondents' statistics; and briefs and arguments by counsel which highlighted fatal deficiencies in respondents' statistical proof. (A-28-29.) The District Court was held to have erred by even considering this evidence and these arguments, together with respondents' evidence, because Yeshiva did not conclusively establish that the omission of qualitative variables caused an inflation of the sex coefficient. (A-28-30.)

Sobel IV, thus, is inconsistent with the language and thrust of the four Justice plurality opinion in *Watson*. It is unclear, however, how the four concurring Justices or Justice Kennedy (who took no part in the decision) would view the evidentiary burdens as they apply to this "*Bazemore* claim".

Since the Court of Appeals' interpretation of *Bazemore* appears to conflict with *Watson*; since it is unclear whether the evidentiary standards applicable to disparate treatment, to disparate impact, or to some different form of analysis apply here; since the absence of a clear majority in *Watson* has clouded the evidentiary issues discussed in that decision; and for all the reasons set forth in its petition, Yeshiva respectfully suggests that the Court find the present case appropriate for review. The need for review of the issues raised by this case is particularly compelling since statistical proof of discrimination necessarily involves an investment of substantial time and expense by the litigants.[5] The allocation of evidentiary burdens described in

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[5] As an example, this action was in pre-trial discovery for seven years. (A-2.) As of 1984, Yeshiva had already spent nearly $2 million, mostly in the

(Footnote continued)

Sobel IV has already influenced the preparation of statistical cases and the reception of statistical evidence in courtrooms across the country. If *Sobel IV* is, in this respect, an erroneous interpretation of this Court's decisions, then the parties in those actions (as well as the parties here) will face still more years of appeals and retrials.

II

THE DISTRICT COURT FOUND NO PROBATIVE EVIDENCE OF DISCRIMINATION AT THE COMMENCEMENT OF THE ACTIONABLE TIME PERIOD AND THE SECOND QUESTION PRESENTED IS THEREFORE SUPPORTED BY THE RECORD

In its petition, Yeshiva urged this Court to make clear that *Bazemore* does not require a District Court finding on whether there were gender-based pay differentials at any time prior to the applicability of Title VII, if the District Court finds no meaningful proof of (a) pay differentials at the commencement of the actionable time period, and (b) disparate treatment thereafter. The Court of Appeals had inferred this requirement from its reading of *Bazemore* and this was a basis for its reversal of *Sobel III*. (A-27.)

Respondents argue that one premise of Yeshiva's position — that the District Court found no meaningful evidence of pay differentials at the commencement of the actionable time period — is not supported by the record. (Respondents' Brief at 8-11.) Respondents assert that the District Court "impliedly if not expressly found that there was discrimination before the act became effective. . . ." (*Id.* at 10.) Respondents' position is not

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preparation of its statistical defense to the respondents' claims. (Joint Appendix in the United States Court of Appeals at A-224-25.) Considerable additional expenses have accrued during the action's long subsequent journey through the federal courts (as reflected in *Sobel II*, *III* and *IV*). Much of this expenditure has been caused by developments in Title VII law which have caused the courts below to repeatedly reevaluate the evidence adduced at trial in light of those developments.

only incorrect but irrelevant as it confuses "pre-Act" with "pre-limitations" proof, an error of great significance which was made by the Court of Appeals as well. (*See* Petition at 23-24.)

In *Sobel I*, the District Court found that respondents' statistics were neither valid nor reliable (A-80), and that "[t]he anecdotal evidence, or, more accurately, the lack thereof, reflected the same absence of sexual discrimination that was suggested by the defendant's statistical evidence." (A-84.)[6] In *Sobel III*, decided after *Bazemore*, the District Court was more specific concerning the absence of evidence of pre-Act discrimination:

> . . . little evidence was offered to establish if, or how, the defendant discriminated against women prior to 1972....

(A-38.) In any event, the actionable time period commenced in 1974 and, as the tables in *Sobel I* show, there was no meaningful statistical evidence of discrimination in that year as to either the entire class or any sub-set. (A-69, 71, 73.) Moreover, even the "sparse" anecdotal evidence "concerned matters predating the statute of limitations date of December 20, 1974." (A-85.)

Given the absence of evidence of disparate salaries on December 20, 1974 and the uncontested finding of neutral treatment thereafter, there is a clear record upon which this Court can, and should, clarify its holding in *Bazemore*. That decision does not require a finding on whether there were gender-based pay differentials in the pre-Act period, if there is no evidence that discriminatory salaries were set and carried over into the actionable time period.

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[6] The District Court's reference to a report of the Senate Committee on Women's Rights is in no respect contrary to its ultimate conclusion that there was no meaningful proof of discrimination at the commencement of the actionable time period. First, the report, which was based on gross, unadjusted salaries, was deemed to have so little probative value that at trial respondents themselves did not introduce it as proof of pre-Act discrimination. Second, the report was issued in 1972 and covered salaries during an even earlier time period. The actionable time period did not commence until December 1974.

(Footnote continued)

III

THE OFFICIAL REPORTED OPINION OF THE COURT OF APPEALS IS CORRECTLY REPRODUCED IN YESHIVA'S APPENDIX

Respondents erroneously describe the official amended report of the Second Circuit's opinion in *Sobel IV*, appearing at 839 F.2d 18, and reproduced in Yeshiva's Appendix (A-1-34), as "incomplete and expurgated" and "incorrectly reported". (Respondents' Brief at 1.)

To the contrary, the Clerk of the Second Circuit, the chambers of the decision's author, Judge Pratt, and representatives of the West Publishing Company have confirmed to Yeshiva's counsel that the decision of the Court of Appeals in *Sobel IV* is correctly reported at 839 F.2d 18. The slip opinion originally prepared by Judge Pratt included the paragraph referred to by respondents in their brief, but the Court of Appeals deleted that paragraph before submitting it to the West Publishing Company for official publication in the Federal Reporter, Second Series. (*See* letter from Judge Pratt's chambers to the West Publishing Co., dated February 16, 1988, attached as Exhibit A.)

In any event, consideration of the omitted paragraph as part of *Sobel IV* provides no greater justification for the Court of Appeals' reassignment order than does the official decision standing alone. That paragraph merely amplifies the Court of Appeals' impression that, after *Bazemore*, the District Judge's efforts "become inadequate". (A-33.) Reassignment on this basis is an improper usurpation of Congressionally delegated District Court authority. (Petition at 26.)

In *Sobel I*, the District Court found that the significance of the report was limited to establishing that "a conscious effort was made after 1972 to avoid any discrimination in salaries" (A-85), a finding that supports Yeshiva's argument that there was no discrimination by 1974, and is far from a finding that there was pre-Act discrimination.

CONCLUSION

Respondent has offered no substantial basis for opposing Yeshiva's petition. In addition, *Watson* has raised further issues which may be promptly resolved in the context of the present case. Therefore, Yeshiva's Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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EXHIBIT A

A-1

UNITED STATES COURTHOUSE
UNIONDALE AVENUE AT HEMPSTEAD TURNPIKE
UNIONDALE, NEW YORK 11553

CHAMBERS OF
GEORGE C. PRATT
CIRCUIT JUDGE

February 16, 1988

Ms. Lyla Davies
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West Publishing Co.
50 W. Kellogg Blvd.
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CORR MADE
MAR 4

Dear Lyla,

This is to confirm a conversation I had this afternoon with your office to have a change made in the opinion authored by Judge Pratt in Sobel v. Yeshiva University, Docket No. 87-7373 (2d Cir. February 4, 1988). At our instruction, West will delete a paragraph from section III (B) of the opinion. The paragraph begins, "Nevertheless, Bazemore exists, and we are concerned . . . ." In the second circuit slip opinion, the paragraph appears on page 1498.

I was informed that deleting the paragraph can be done in time so that it will not appear either in the advance sheets or in the hardcover version of Fed.2d, and we appreciate your prompt attention which makes that possible.

Sincerely,

Sam Marcosson
Law Clerk to Judge Pratt